108 US 477 — 522
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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 511 2 2 4

J. GROSS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES MORTGAGE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED MAY 13, 1880.

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INDEX.

	Original.	Print.
Caption	1	1
Transcript from superior court filed	1	1
Decree	4	2
Appeal	15	6
Agreed case for appeal	16	7
Certificate of judge	37	15
Appeal bond	37	15
Clerk's certificate	42	16
Assignments of errors	43	17
Hearing	46	18
Decree	46	18
Petition for rehearing denied	48	19
Leave to file supplemental petition	50	19
Supplemental petition denied	51	20
Opinion	52	20
Dissenting opinion	72	27
Certificate of chief justice	73	27
Bond	75	28
Clerk's certificate	77	29
Certificate of chief justice	78	29
Writ of error	79	29
Citation	81	30
Assignment of errors	82	30
Appearance for plaintiff in error	84	31

1 At a supreme court, begun and held at Ottawa, on Tuesday the twelfth day of September, in the year of our Lord one thousand eight hundred and seventy-six, within and for the northern grand division of the State of Illinois. Present, Benj. R. Sheldon, chief justice; Sidney Breese, justice; Jno. Scholfield, justice; T. Lyle Dickey, justice; John M. Scott, justice; Alfred M. Craig, justice; Pinkney H. Walker, justice.

THE UNITED STATES MORTGAGE COMPANY
vs.
J. GROSS, MOSES W. POWELL, JOSEPH HALL, Harvey A. Winch, Levi L. Leach, Augustus N. Wheeler, Michael Fahey, William Nelson. Samuel Nelson, William C. Baker, J. J. Smith, J. L. Wise, Wm. A. Reason.

No. 339. Appeal from superior court of Cook's County.

Be it remembered that, afterwards, to wit, on the thirteenth day of September, in the year of our Lord one thousand eight hundred and seventy-six, came The United States Mortgage Company, by Walker, Dexter and Smith, its attorneys, and filed in said court a certain transcript of the record and proceedings of the superior court of
2 Cook County, in the words and figures following, to wit:

UNITED STATES OF AMERICA,
State of Illinois, County of Cook, ss:

Pleas before the honorable Samuel M. Moore, one of the judges of the superior court of Cook County, in the State of Illinois, holding a branch court of said court on the twenty-seventh day of April, A. D. 1876, being one of the days of a regular term of said superior court of Cook County, begun and holden at the court-house in the city of Chicago, in said county and State, on the first Monday, being the third day of April, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States of America the one hundredth. Present, the honorable Samuel M. Moore, judge of the superior court of Cook County; Charles H. Reed, prosecuting attorney; Francis Agnew, sheriff of Cook County.

Attest:

JOHN J. HEALY, *Clerk.*

Be it remembered that heretofore, to wit, on the twenty-seventh day of April, in the year of our Lord one thousand eight hundred and seventy-six, the same being one of the days of the April term of the
3 superior court of Cook County, the following, among other proceedings were had in said court, and entered of record, to wit:

KIRK HAWES, ASSIGNEE OF THE NATIONAL Life Insurance Company,
vs.
A. R. SLOAN AND R. N. WETHERELL, AS Sloan and Wetherell, Moses W. Powell, Adam McKay, George Hall, and Henry O. Winch, as Hall and Winch, Levi L. Leach, August W. Wheeler, Nettie Granger, Samuel Shay and William N. Sharp, as Granger and Sharp, Michael Fahey, William Nelson and Samuel Nelson, as William and Samuel Nelson, William C. Baker, J. J. Smith and J. L. Wise, as Baker, Smith & Co., First National Bank of St. Joseph, Miller, Watson and Co., Sanford B. Perry, trustee; Josiah L. Lombard, trustee; Carrie Nutt Forsythe, W. A. Reason, United States Mortgage Company, and J. Gross.

2360. 54654. Bill.

AND

J. GROSS
vs.
KIRK HAWES, ASSIGNEE OF THE National Life Insurance Company, A. R. Sloan, R. N. Wetherell, M. W. Powell, Adam McKay George Hall, Henry O. Winch, Levi L. Leach, August W. Wheeler, Nettie Granger, Samuel Sharp, William M. Sharp, Michael Fahey, William Nelson, Samuel Nelson, William C. Baker, J. J. Smith, J. L. Wise, First National Bank of St. Joseph, Miller, Watson and Company, Sanford B. Perry, trustee; Josiah L. Lombard, trustee; Carrie Nutt Forsythe, W. A. Reason, United States Mortgage Company, City of Chicago, S. S. Hayes and Daniel O'Hara.

Cross-bill.

Now, on this day, this cause coming on to be heard, upon the bill of Kirk Hawes, assignee of the National Life Insurance Company, and the answers of Sloan and Wetherell, M. W. Powell, Hall and Winch, L. L. Leach, A. W. Wheeler, Granger and Sharp, Samuel and William Nelson, Michael Fahey, Baker, Smith and Co., Josiah L. Lombard, W. A. Reason, United States Mortgage Company, and J. Gross, and replications thereto; and it appearing to the court that said Adam McKay, First National Bank of St. Joseph, Miller, Watson and Co., Sanford B. Perry, and Carrie Nutt Forsythe, were duly served with summons to answer said bill, ten days before the commencement of this term, and that they have made default herein.

And also said cause coming on to be heard at the same time, upon the cross-bill of said Gross, and the answers thereto of said Sloan and Wetherell, M. W. Powell, Hall and Winch, L. L. Leach, A. W. Wheeler, Granger and Sharp, M. Fahey, William and Samuel Nelson, Baker, Smith & Co., W. A. Reason, United States Mortgage Company, City of Chicago, S. S. Hayes, and Daniel O'Hara, with replications thereto; and it appearing to the court that said Kirk Hawes, assignee, &c., Adam McKay, Sanford B. Perry, Josiah L. Lombard, Carrie Nutt For-

sythe, First National Bank of St. Joseph, and Miller, Watson and Co., were duly served with the rule of this court, to appear within a certain fixed time and answer said cross-bill as required by law, and that said time has expired, and said defendants last aforesaid has failed to answer said cross-bill, but have made default therein, and upon proofs being introduced in open court, it appearing to the court that one Benjamin Lombard was the owner in fee of lot thirteen (13), and the south half ($\frac{1}{2}$) of lot twelve (12), in block one hundred and thirty-nine (39), school section, addition to Chicago, Cook County, Illinois, on the
6 15th day of August, A. D. 1872, and that on the day last mentioned said Benjamin Lombard executed to said United States Mortgage Company a deed of mortgage conveying said lot (13) and south half of lot (12) to said mortgage company, for the purpose of securing to said mortgage company the payment of fifty thousand dollars in gold coin, in and by which said mortgage-deed it was expressly stipulated and agreed by and between said United States Mortgage Company and said Benjamin Lombard that this mortgage is to be subject to the right of the city to take so much of said lots as shall be necessary for the opening of Dearborn street, being about 36 feet, more or less, off the west side of said premises, in which event any benefit which may accrue to the said party of the first part herein, may be paid by the city to said party of the first part direct. And it appearing to the court that on December 10th, 1872, said Benjamin Lombard sold and conveyed said lot (13), and south half of lot (12), by warranty-deed to said National Life Insurance Company, and as part payment therefor, and to secure part of the purchase money said National Life Insurance Company executed one promissory note, payable to its own order, in three years after the date thereof, for the sum of twelve thousand two hundred and seventy-three dollars, with interest at the rate of ten per centum per annum, payable semi-annually,
7 as alleged in said cross-bill, and at the same time, to wit, December 10th, 1872, said National Life Insurance Company executed a deed of trust to Josiah L. Lombard, on said lot 13 and south half of lot twelve, to secure the payment of said note last mentioned, and then and there endorsed and delivered said note to said Benjamin Lombard, and that said trust-deed then became a lien upon the whole of said premises.

And it further appearing to the court that said J. Gross is the legal and equitable holder and owner of said note so secured by said trust-deed, and that there is now due and unpaid on the same the sum of sixteen thousand one hundred and fifty-nine and $\frac{45}{100}$ dollars; and it further appearing to the court that on or about March 17th, 1873, the common council of the city of Chicago passed an ordinance for the opening and extension of Dearborn street in said city, from Jackson street south of Fourteenth street, and that in pursuance of said ordinance, said city did proceed to lay out and extend said Dearborn street as aforesaid, and to condemn a sufficient amount of property along the line of said street, to open and extend the same as aforesaid, and that in so doing thirty-five feet off from the west end of said lot 13 and south half of lot 12, was condemned by said city for the use of said street; and it further appearing to the court that at the April term of said superior court of Cook County, to wit, on the twenty-third
8 day of April, 1874, a judgment was entered in said superior court against said city of Chicago, in favor of the owner of said lot 13 and south half of lot 12, for the sum of ten thousand nine hundred and fifty-two and $\frac{73}{100}$ dollars damages for the value of said thirty-five feet, so taken as aforesaid, which said judgment has not been reversed or satisfied, and for which no appeal or writ of error has been taken; and

it further appearing to the court that subsequently an assessment was levied by said city of Chicago against that part of said premises not taken, in the sum of $15,897.84, for benefits to that part of said lot 13 and south half of lot 12 not taken for a street as aforesaid, and upon which a building has been erected as hereinafter set forth.

And it further appearing to the court, as matter of law, that said United States Mortgage Company, by the clause in its mortgage heretofore quoted, waived any benefit which might result to said Benjamin Lombard, or his grantees or assigns, and to any damages which might be adjudged against said city of Chicago for the taking of any portion of lots 13 and south half of lot 12 for the use of said Dearborn street, and the subsequent conveyance of said property to said National Life Insurance Company, and the execution of said trust-deed to said Josiah L. Lombard by said National Life Insurance Company to secure
9 said note for $12,273, said Gross, as the legal and equitable owner of said note, has a valid first lien upon said thirty-five feet, and is justly entitled to all the proceeds arising out of the condemning of said thirty-five feet as aforesaid, and is justly entitled to the whole of said judgment against said city of Chicago, for said sum of $10,952.73, together with all interest due thereon, and that said last-mentioned sum ought to be paid over by said city to said Gross; and it appearing to the court that said insurance company has been adjudicated a bankrupt, and that said Hawes is the assignee thereof, and that he filed said bill for the purpose of consolidating a large number of suits and claims against said premises, and for the purpose of adjusting the amounts claimed by said parties against said estate by reason of mechanics' liens, judgment and mortgage liens, and for the purpose of having said premises sold and the proceeds of such sale distributed among the several parties hereto as their rights might appear.

And it further appearing to the court that a building has been erected on that part of said premises not taken for said Dearborn street, and that said Powell, Hall and Winch, Leach, Wheeler, Fahey, William and Samuel Nelson, Baker, Smith, and Wise and Reason have acquired liens on said building and upon that part of said prem-
10 ises on which said building stands, subject, however, to the respective liens of said United States Mortgage Company and said J. Gross, as their rights herein appear; that the claim of said Hall and Winch amounts to the sum of $1,131, with interest at six per centum per annum, from January 1st, 1874, at which time the lien of said Hall and Winch attached making the full sum of $1,278; that the claim of said Michael Fahey amounts to the sum of $676.57, and that his lien attached January 1st, 1876; that the claim of said Wheeler amounts to the sum of $1,275.42, with interest on $283.41 thereof, from January 1, 1874, and on $992 thereof from January 1, 1874, at which *sales* the lien of said Wheeler attached on said premises, making the full sum of $1,430.96; that the claim of said Leach amounts to the sum of $5,000, with interest from April 10th, 1873, and the further sum of $127.63, without interest, and $64.67 with interest from April 10, 1873, making an aggregate of $6,060.55; that said Baker, Smith, and Wise are entitled to the sum of $4,033.59, with interest from December 1, 1873, making a total of $4,360.00; that said Powell is entitled to the sum of $332.75, and $31.89 interest from November 1, 1873, making a total of $364.64; that said Wm. and Samuel Nelson are entitled to a lien on said building from October 11, 1872, for the sum of $325, with interest, making a total of $375.17; that said Reason is entitled to a lien on
11 said building for the sum of $391.57. And it further appearing to

the court that said Sloan and Whetherell, Adam McKay, Nettie Granger, Samuel Sharp, William Sharp, First National Bank of St. Joseph, Miller, Watson and Co., Sanford B. Perry and Carrie Nutt Forsythe, have no interest in or to said premises or liens thereon. And the court further finds, as a matter of law, that the lien created by the first deed executed by the said National Life Insurance Company to the said Josiah L. Lombard is inferior and subject to the said mortgage lien of the said United States Mortgage Company, and to the several mechanics' liens herein as to the whole of said lots 13 and south half of lot 12, with the said building erected thereon, except as to the said stri thirty-five feet in width off from the west end of said premises condemned for the widening of said Dearborn street; that the lien created by the said mortgage executed to said United States Mortgage Company is prior and paramount to the several liens of the said mechanics' lien claimants whose liens are herein established only to the extent of the value of the land at the time when the contract between said Leach and said Benjamin Lombard was made, to wit, September 11, 1872, and to that extent is to be preferred in the division of the proceeds arising from the sale of the premises under this decree that the liens of said mechanics' lien claimants whose liens are established herein operate and attach to the said building erected on
12 said premises as prior and paramount liens thereon to the extent of the value of the same, diminished by the value of the foundation and improvements which had been made prior to September 11, 1872; that the said mechanics' lien claimants, whose liens are established herein, have respectively no preference over one another in respect to any superiority of lien on account of or by reason of the different dates of their respective contracts, or the different dates or time when their respective liens attached, and that said mechanic lien claimants whose liens are herein established, are entitled to be paid in full or pro rata, as the case may be, from the proceeds of the sale of the whole premises as made under this decree, after the said United States Mortgage Company shall have been paid their proportion of the said proceeds as determined and directed by this decree. And the court further finds that, on account of the depreciation in the value of said premises since the 15th day of August, 1872, that the present value of said land, excluding said thirty-five off from the west end thereof, but including the improvements made thereon prior to the 11th Sept., 1872, is thirty-eight thousand dollars, and that the present value of the building, excluding the value of said improvements made prior to September 11th, 1872, is forty-two thousand dollars, making the present value of the whole premises, excluding said 35 feet, eighty thousand dol-
13 lars; that the proceeds arising from the sale of said premises under this decree after payment of costs and expenses of making said sale, thirty-eight eightieths of the same should be applied towards the payment of the claim of said United States Mortgage Company, and the remainder, to wit, forty-two eightieths, should be applied to the payment of the claims of said mechanic' lien claimants as established by this decree, and if any surplus then remains the same to be applied in payment of said claim of said United States Mortgage Company, and any balance that may then remain, to be applied as hereinafter provided; but in the event said $\frac{42}{80}$ of the amount of the proceeds of such sale is insufficient to pay and satisfy all the said mechanics' liens as herein established, then said $\frac{42}{80}$ of such proceeds should be applied to the payment of the said several mechanics' lien claims pro rata, according to the respective amounts due each lien claimant, as herein

issory note at time of filing said bill was, and for a long time prior thereto had been, held and owned by said J. Gross; and for the further purpose of having a certain mortgage on said premises executed by one Benjamin Lombard, the grantor of said National Insurance Company to the United States Mortgage Company, under and by virtue of which said mortgage company claims to have a valid first lien upon said premises, declared null and void, on the ground that said United States Mortgage Company is, and was at the
19 time said mortgage was executed, a foreign corporation, organized under and by virtue of *of* the laws of the State of New York, and having its principal place of business in the city of New York, and having no legal existence in this State, could not under the laws of the State of Illinois, where said mortgage was executed and where said property lies, take the title to real estate situated in the State of Illinois, either by way of mortgage or otherwise, nor acquire any interest therein, or any valid title thereto.

And the United States Mortgage Company filed its answer to said bill and cross-bill, alleging said Benjamin Lombard and wife executed to it a mortgage dated August 22d, 1872, to secure a loan of $50,000.00, gold coin of the United States, with interest at nine per cent. per annum payable in semi-annual installments in gold coin, and running five years, on the property described in said bill, which mortgage was duly recorded, and that there is due it thereunder $70,000.00, and that said Lombard made default in payment of the interest due October 1st, 1872, and all interest, taxes, insurance, and assessments, contrary to the covenants of the mortgage, whereby the whole debt became at once due in thirty days after October 1st, 1873; that it was authorized to sell said property on thirty days' notice to pay such debt.

20 That the city of Chicago, under an ordinance for the extension of Dearborn street and payment of the cost thereof by special assessment, did, under the statute, proceed to condemn the west 35 feet of said lots, and assess the damages at $10,952.73, and in the same proceeding did specially assess said lots the sum of $15,897.84.

That said city has never taken possession of said condemned parts of said lots, nor attempted to collect said assessment.

That in equity the damages ought to be set off against said special assessment of benefits. That said Lombard and said National Life Insurance Company were insolvent when default was made in payment of interest due said mortgage company, and when said assessment of damages and of benefits were made, and still are, and their estates worth nothing, or but a very small per cent. of their respective debts.

And prays the protection of its rights and security under its said mortgage.

The several mechanics and material men filed answers and cross-bills claiming liens for work and material on said building, for whom the court found as in the decree herein rendered.

And it is agreed that proper pleadings were filed by the several parties to such action, whereby were properly put in issue the questions presented by this agreed case, and the same were determined by
21 the court as hereafter declared.

And whereas a hearing has been had upon said bill, cross-bills, answers, replications, and testimony taken in open court, and a final decree rendered therein as hereinafter set forth:

Now, in order to present certain questions at issue in such cause to the supreme court of this State, and to avoid the necessity of taking up a full record, which would be very voluminous, the following facts

are agreed upon as having been fully established at the hearing of said cause, which, with the rulings of the court thereon, were as follows, to wit:

First. That, on the 22d day of August, 1872, Benjamin Lombard, being the owner in fee of said lots, for the purpose of securing the necessary funds with which to erect a six-story and basement brick and stone building on said premises, negotiated a loan of $50,000 in gold coin from the United States Mortgage Company, and for the purpose of securing payment of the same, together with the interest thereon at 9 per cent. per annum, payable semi-annually in gold coin, said Benjamin Lombard, his wife joining therein, executed and delivered to said United States Mortgage Company his certain mortgage deed of the whole of said premises, wherein said Lombard covenanted
22 to pay such debt and interest, and that the real estate was clear of all encumbrances, and that he would warrant and defend the same and suffer no impairment of the security of said mortgage company, and that such mortgage should stand as security for any money paid for taxes or insurance, and provided that if default was made in the payment of any installment of half-yearly interest when due, or on failure to pay any taxes or assessments on said lots, or keep any other covenants, that the whole of said debt should become at once due, at the option of said mortgage company, and said company might sell said property to the highest bidder, after 30 days' notice by advertisement in any daily newspaper published at Chicago, Illinois.

That on the day of execution said mortgage was duly filed and recorded in the recorder's office of said Cook County, Illinois.

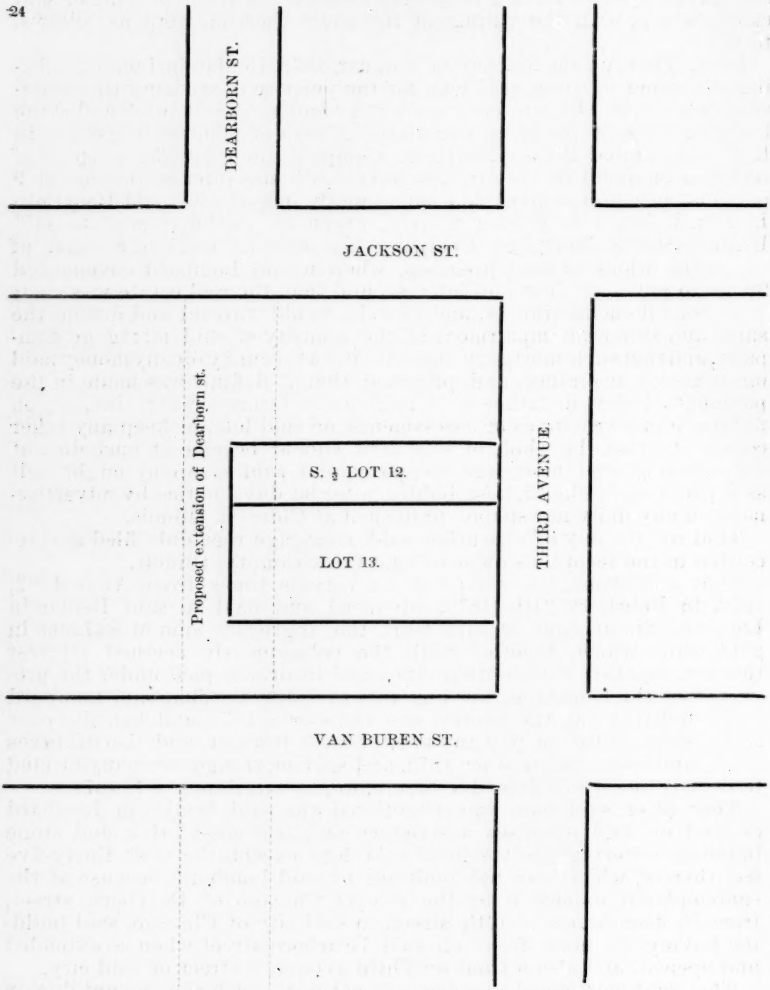
That said mortgage company, at various times from August 22, 1872, to February 24th, 1873, advanced and paid to said Benjamin Lombard, on account of said loan, the aggregate sum of $47,000 in gold coin, which, together with the subsequently accrued interest thereon, together with certain taxes and insurance paid under the provisions of the mortgage, now amounts to $64,968. That said Lombard failed to pay the interest due October 1, 1873, and has also ever
23 since failed to pay any part of such interest, and also all taxes and assessments since 1872, and said mortgage company elected to declare the whole debt due heretofore, to wit, January 1, 1874.

That after said loan was negotiated the said Benjamin Lombard erected on said premises a six-story and basement brick and stone building covering the whole of said lots, except the west thirty-five feet thereof, which was not built on by said Lombard because of the contemplated extension by the city of Chicago of Dearborn street, from Jackson street to 14th street, in said city of Chicago, said building having its main front on said Dearborn street when so extended and opened, and also a front on Third avenue, a street of said city.

That said mortgaged premises are not now worth the amount due on said mortgage to said mortgage company, together with the special assessment thereon hereinafter stated.

The following diagram is a correct representation of the manner in which said lots are laid out, and shows said contemplated extension of Dearborn street, and front lines of said building:

24



That there was inserted in said mortgage at the time said mortgage was executed by said Benjamin Lombard and wife to said United States Mortgage Company, the following clause after the description of the lots mortgaged and the habendum clause, viz:

"It is understood and agreed that this mortgage is to be subject to the right of the city to take so much of said lots as shall
25 be necessary for the opening of and extension of Dearborn street, being 36 feet, more or less, off the west end of said premises; in which event any benefit which may accrue to the said party of the first part herein may be paid by the city to said party of the first part direct."

That on the 10th day of December, 1872, said Benjamin Lombard had

erected the walls of said building, put on the roof, and partly finished the interior of the same.

2nd. That on said December 10th, 1872, said Benjamin Lombard sold and conveyed the whole of said premises, together with the building thereon, by warranty deed, subject to the said mortgage to said mortgage company to said National Life Insurance Company of Chicago, whereof said Benjamin Lombard was president, and one of the principal stockholders, for the sum of $100,173.00, a part of which was in the assumption of said debt due to the said United States Mortgage Company, and that in consideration of such purchase, and as part of the purchase money, on the same day said National Life Insurance Company executed and delivered to said Benjamin Lombard its certain promissory note for the sum of $12,273.00, drawn to its own order and by it endorsed in blank, payable in three years after its date, with
26 interest at the rate of ten % per annum, payable semi-annually; and to secure the payment of the same, said National Life Insurance Company on the same day made, executed, and delivered to Josiah L. Lombard, as trustee, a certain trust deed, containing full covenants of warranty, conveying the whole of said premises, which said trust deed was duly filed and recorded in the recorder's office of said Cook County; that on receipt of the note for $12,273, and the trust deed made by the National Life Insurance Company to secure the same as part payment for said lots, said Benjamin Lombard sold and delivered the same to his wife for consideration of $11,000, which was paid in money and bonds amounting to $7,000, and some release of dower making up the balance. That the wife of said Lombard retained said note and trust deed for some time, when at the request of said Benj. Lombard, she delivered the same to him for the purpose of raising money on the same; that said B. Lombard borrowed from a bank in Chicago $4,500, giving said note and mortgage as collateral security.

That subsequently said collateral was sold, and one J. L. Lombard became the purchaser of said note through said bank, for the sum of $3,200, and subsequently sold and delivered said note to the said
27 J. Gross for the sum of $5,000, which was paid by said Gross, executing his note to said J. L. Lombard for the sum of $5,000; and that said Benjamin Lombard and said J. L. Lombard have no interest in or to said note now held and owned by said Gross; that said note came into possession of said Gross, bearing only the endorsement of said National Life Ins. Co., to whose order the same was made payable as aforesaid.

That no part of said note has ever been paid, and that there is now due and owing on the same as principal and interest the sum of sixteen thousand one hundred and fifty-nine and $\frac{45}{100}$ dollars.

3d. That on or about June 1st, A. D. 1874, said National Life Insurance Company was duly adjudged a bankrupt, and said Kirk Hawes appointed its assignee, and that no dividend has been paid to the creditors of said company, and the estate will pay but a small per cent. of its debts.

That prior to said date, said Lombard was duly declared a bankrupt, and that no dividend has been paid to his creditors, and no assets sufficient for a dividend have been received by his assignee, nor are any known to exist.

4th. That on or about March 17th, A. D. 1873, the City of Chi-
28 cago, one of the defendants in said cross-bill, by its common council, under the provisions of articles nine, chapter twenty-four of the Revised Statutes of the State of Illinois, passed an ordinance for

the opening and extension of said Dearborn street from Jackson street on the north, to 14th street on the south; the cost and expenses incurred thereby, to be paid for by special assessment upon the property along the line of such street specially benefitted thereby.

That afterwards, and in pursuance of said ordinance and statute, and on or about April 23d, A. D. 1874, a petition having been previously filed by said city in the superior court of Cook County, praying for the condemnation of thirty-five feet off of the west end of said lots, and that the just compensation to be paid for the taking of the said thirty-five feet off from the west end of said lots for the purposes of said street might be ascertained by a jury. The jury called for that purpose, by their verdict, awarded and fixed, as the just compensation to be paid for the taking of said thirty-five feet the sum of ten thousand nine hundred and fifty-two and $\frac{73}{100}$ dollars, upon which said verdict so rendered judgment by said court was afterwards duly entered of record, and the same is now in full force and effect, and in no part satisfied or paid.

29 The following is a true copy of the formal part of said judgment:

"Superior court of Cook County. April term, A. D. 1874.

"THE CITY OF CHICAGO
"*vs.*
"HENRY M. SHEPARD ET AL. } 5862. 44471. April 23d, 1874.

"On motion of the counsel to the corporation, the court finding (and the court doth find) that all the defendants in said cause have been duly served with process in this cause, or have entered their appearance herein, and have all been legally brought into court, the court doth order and adjudge that the respective owners of the several pieces or parcels of land, improvements, and property hereinafter described receive of the said City of Chicago the respective sums of money awarded by the jury in the cause as the just compensation for taking and damaging the property, land, and improvements, respectively, as follows, to wit:

"*School section, addition to Chicago.*

"So much of the following described lots as lie east of a line drawn from a point in the south line of Jackson street $430\frac{1}{10}$ feet west of the west line of State street to a point in the north line of Van-
30 Buren street $429\frac{56}{100}$ feet west of the west line of State street.

"'S. $\frac{1}{2}$ lot 12, and all lot 13, block 139, ten thousand nine hundred and fifty-two dollars and seventy-three cents.'"

That afterwards, under the same statute, said city filed a supplemental petition in said proceedings praying the court to cause an assessment to be made upon the property along the line of said proposed extension of said Dearborn street, to be specially benefitted thereby, for the purpose of raising the amount necessary to pay the compensation and damages awarded for the property taken or damaged by such proposed extension, together with the costs of the proceedings therein, and afterwards commissioners were duly appointed in the manner provided by law, who duly assessed the remaining portion of said premises not taken by said city as aforesaid, the sum of $15,897.84, as benefits to the same; from all which said proceedings no appeal or writ of error has been taken.

That no proceedings have been taken by the city to enforce such assessment of benefits, nor has the city paid any person any part of the damages awarded for opening said street extension, nor has said city taken possession of any part of said premises or of any part of
31 the proposed extension of said Dearborn street.

5th. It is further agreed that said United States Mortgage Company is, and was at the time said mortgage to it was executed, a corporation organized under and by virtue of the laws of the State of New York, and still is a foreign corporation, having its principal office and place of business in the city of New York.

The question in dispute between said Gross, and said United States Mortgage Company is:

1st. Whether the said mortgage company took or acquired any valid right, title, or interest in or to said premises or any part thereof, under and by virtue of said mortgage, or had or has any valid lien thereon as against him, said Gross, and the court held it did.

2nd. And further, whether the amount so awarded as benefits to said premises should be set off against the amount awarded as damages, and if not, whether said Gross, as the legal holder and owner of said note, secured by said trust deed, is entitled to receive said sum of $10,952.73, so awarded as damages, when said thirty-five feet
32 shall be taken for purposes of said street, or whether the same should be paid to said United States Mortgage Company; and the court held that such set-off should not be made, and that said Gross, as holder of said note, is entitled to receive from said city said sum of $10,952.73, so awarded as damages, whenever said city shall take said thirty-five feet of said premises so condemned for the purposes of said Dearborn street as aforesaid, and that said United States Mortgage Company was not entitled thereto, by reason of the clause in said mortgage heretofore quoted.

3d. Whether, under such facts, if said Gross is entitled to receive said award of damages, he should receive the full amount thereof, or only the amount paid by him for the note, and the interest thereon, and the court held that he was entitled to the whole thereof.

It is further agreed that def't L. L. Leach contracted in writing with said Benjamin Lombard, about August 1st, 1872, to build the walls and do the stone work of said building, and that on April 10th, 1873, such work was about completed, and he settled with said Benj. Lombard according to the contract between them, and received his individual notes for $5,000, due in 6 mos. thereafter, with 10 % int.,
33 as he had agreed to do by his building contract with said Lombard, which notes he assigned to the Union Foundry Works of Chicago, a corporation, as security on a contract for iron, and the Union Foundry Works discounted such notes with the First National Bank of Chicago, which held the notes till due, and, being unpaid, said bank called upon its indorser, said foundry works, which took up the notes, and in turn retired them to said Leach, and subsequently sued said Leach on book acc't for the amount he owed them for said iron, and obtained judg't vs. said Leach in said suit in Jan., 1874.

Subsequently, and in Feb'y, 1875, in consideration that the Union Foundry Works would forbear to levy any execution under their said judgment vs. said Leach, and for divers other good and valuable considerations, said Leach agreed with said foundry works to give it the benefit of any mechanics' lien said Leach should have decree for in this suit, which was begun 22d of January, 1874.

The questions of law in this point is whether said Leach had released

his lien; and the court held said Leach had a lien now for such materials and work, and as decreed; to which the def't Gross excepted.

34 It is agreed that def'ts Hall & Winch contracted with the National Life Insurance Co. during October, 1873, to furnish 167 doors for said building, which doors were especially made for said building, and were all delivered into said building during November and December, 1873; only 25 of the doors were fitted and hung, the balance were piled in the building when said ins. co. went into bankruptcy, and the unhung doors were removed by the assignee and stored elsewhere for a time, and again removed to said building, and have since been piled up therein by said assignee.

The value of the whole doors was $1,133.75 and of the doors actually hung $168.75, and of those not used, but piled up in the building, $965.

The question of law was, whether def'ts Hall and Winch are entitled to a mechanics' lien for the value of the 142 doors not fitted, placed, and hung, but only delivered into the building, and now piled therein, as stated; and the court held they were, to which def't Gross excepted.

It is agreed that def't Augustus W. Wheeler sold hardware to said National Insurance Company during the fall of 1873, specially designed and intended to be used in said building, and that the balance due therefor on the day of was $1,275.42, for which

35 sum he then took the promissory note of said Benjamin Lombard, due 90 days thereafter, which note a few days thereafter he exchanged for the draft of said Lombard on said National Life Ins. Co., duly accepted by said company, and running 90 days; that the last parcel of hardware, amounting to $842 of the above sum of $1,275.42, was delivered at the office of said ins. co., neat by said building, and put in its vaults for safe-keeping, and not at the building on said lots, and no part of it was ever used in said building, but part of it was sold under a pledge of it by said ins. co., and a part of it went into the hand of said pl'ff Hawes, as assignee of said ins. co., and was by him sold as such assignee, under an order of the court of bankruptcy.

The question was, whether said Wheeler was entitled to a mechanic's lien on said building or lots for said debt, and the court held he was, and so decreed, to which def't Gross excepted.

And on the trial of said cause, the proper objections and exceptions were taken by the several parties to the said rulings of the court.

The decree hereinbefore referred to and entered in said cause

36 will be attached hereto, and be part of this agreed case, and duly certified by the clerk of said court.

If the rulings of the court below, as set forth herein, were correct, then the decree will be affirmed; and if not, then it will be reversed, or modified, as the supreme court may direct.

The appeal from the decree of said superior court is taken by said United States Mortgage Company, and was allowed upon its bond with approved sureties in the penal sum of $20,000, which bond has been made and approved as required, and this agreed case is to be

taken to the supreme court on such appeal, in place and stead of a full record of the case.

Witness our hands this 31st day of August, 1876.

KIRK HAWES, *Assignee, Compl't.*
WALKER, DEXTER & SMITH,
Att'ys for U. S. Mort. Co.
THOMAS S. McCLELLAND,
Sol. for J. Gross.
J. W. WANGHOP,
Sol'r for A. W. Wheeler.
WILSON & PERRY,
Sol'rs for Hall & Winch.
GEO. P. WHITCOMB,
Sol'r for L. L. Leach.

37 The undersigned, judge of the superior court of Cook County, Illinois, before whom the above cause was tried, certifies that the foregoing questions of law arose upon the trial of such case and were determined as above set forth, by the court, upon the pleadings and evidence relating thereto, substantially as hereinbefore set forth; and at such hearing said above-named parties elected and desired to present such questions for review by the supreme court upon an agreed case, as the other parties appeared content to abide by the decree of the court; and to take up a full record would be very large, as nine separate causes were consolidated herein.

Witness my hand and seal this 31st day of August, 1876.

S. M. MOORE. [SEAL.]

And on the 24th day of June, in the year last aforesaid, there was filed in the office of the clerk of said court a certain appeal bond, which is in words and figures as follows, to wit:

Know all men by these presents that we, The United States Mortgage Company, of New York, as principal, and Heman G. Powers and William F. Coolbaugh, sureties, of the county of Cook, and State of Illinois, are held and firmly bound unto J. Gross,
38 Moses W. Powell, Joseph Hall, Henry A. Winch, Levi L. Leach, Augustus N. Wheeler, Michael Fahey, William Nelson, Samuel Nelson, William C. Baker, J. J. Smith, J. L. Wise, Wm. A. Reason, also of the same county and State, in the penal sum of fifteen thousand dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly by these presents. Witness our hands and seals this fourth day of May, A. D. 1876.

The condition of the above obligation is such, that whereas the said several obligees did, on the 27th day of April, A. D. 1876, in the superior court of Cook County, in the State aforesaid, and of the April term thereof, A. D. 1876, recover a judgment or decree in a proceeding instituted by Kirk Hawes, assignee, as pl'ff, against the said United States Mortgage Company and said several obligees and others as def'ts, to have settled the claims and liens of all parties to said suit, to certain lots and improvements thereon, and the property sold and proceeds distributed to *to* the valid claimants, wherein said court decreed in favor of said several obligees, as by its decree appears, to which
39 reference is here made, from which said judgment of the said superior court of Cook County the said United States Mortgage

Company has prayed for and obtained and appeal to the supreme court of said State:

Now, therefore, if the said United States Mortgage Company shall duly prosecute its said appeal with effect, and moreover *the* pay the costs and damages rendered and to be rendered against it in case the said judgment shall be affirmed in said supreme court, and which said obligees may suffer by such appeal, then the above obligations to be void; otherwise to remain full force and virtue.

THE UNITED STATES MORTGAGE COMPANY, [SEAL U. S. M. CO.]

By S. D. BABCOCK, *President.* [SEAL.]
HERMAN G. POWERS.
WILLIAM F. COOLBAUGH.

CITY AND COUNTY OF NEW YORK, *ss:*

On this 4th day of May, 1876, personally appears before me, Samuel D. Babcock, known to me to be the president of The United States Mortgage Company, and who acknowledged to me that he executed this instrument as president of said company, for the purposes therein mentioned, and in compliance with the powers conferred on him as such president.

40 [NOTARIAL SEAL.] WM. P. DIXON,
Notary Public, N. Y. Co., 121.

STATE OF NEW YORK,
City and County of New York, ss:

I, William Walsh, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that William P. Dixon, whose name is subscribed to the certificate of the proof or acknowle'gment of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgment a notary public in and for the city and county of New York, dwelling in the said city, commissioned and sworn and duly authorized to take the same, and further that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine. I further certify that said instrument is executed and acknowledged according to the law of the State of New York.

In testimony whereof I have hereunto set my hand and affixed
41 the seal of the said court and county the 4th day of May, 1876.
[SEAL.] WM. WALSH, *Clerk.*

(Endorsed:)
Approved this June 24th, 1876.

S. M. MOORE.

42 STATE OF ILLINOIS,
Cook County, ss:

I, John J. Healy, clerk of the superior court of Cook County, within and for the State of Illinois, do hereby certify that the above and foregoing is a full, true, and complete transcript of a certain decree made and entered of record in said court, and of a certain "Agreed case for appeal," together with the appeal bond now on file in my office, in a certain cause lately pending in said court on the chancery side thereof, wherein Kirk Hawes, assignee, &c., was complainant in the original bill, and A. R. Sloan et al., defendants in said original bill, and J.

Gross, complainant, and Kirk Hawes, assignee, &c., et al., defendants in the cross-bill.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Chicago this sixth day of September, A. D. 1876.

{ SEAL SUP. C'T } JNO. J. HEALY, *Clerk.*
{ COOK CO., ILL. }

Received of United States Mortgage Co., $12.00, transcript fees.
JNO. J. HEALY, *Clerk.*

SEPT. 7, '76.

43 Supreme court of Illinois, northern grand division. September term, A. D. 1876.

THE UNITED STATES MORTGAGE COMPANY, appellant, *vs.* J. GROSS ET AL., APPELLEES. } Appeal from the superior court of Cook County.

Comes the said appellant, The United States Mortgage Company, and say that there is manifest error in the record and proceedings aforesaid, because it says:

First. The court below erred in deciding that appellant had waived its mortgage lien on the west thirty-five feet of the lots mortgaged to it, and regardless of the keeping of the covenants made by the mortgagor with appellant.

Second. The court below erred in deciding that the appellee J. Gross was entitled to receive from the city of Chicago the amount awarded as compensation or damages for the taking the west thirty-five feet of said lots for street; and regardless of the payment of the debt then due appellant, and of the covenants of the mortgagor with appellant.

44 Third. The court below erred in deciding that said J. Gross appellee was entitled to have and receive such award of damages, irrespective of the payment of the assessment of benefits made to pay such award.

Fourth. The court below erred in deciding that said J. Gross was entitled to recover the full face of the note held by him, and the full amount of the award of damages, even if entitled to recover anything.

Wherefore, appellant prays, that the said decree may be reversed so far as concerns the errors herein indicated.

WALKER, DEXTER & SMITH,
Solicitors for Appellant.

Assignment of cross-errors by J. Gross, one of said appellees.

I. The court erred in finding the mortgage of said United States Mortgage Company valid and giving it a lien on any part of said premises.

II. The court erred in making the mortgage of said mortgage company a prior lien upon that part of said premises not taken for a street, to the lien of said Gross.

III. The court erred in finding that said L. L. Leach had a mechanic's lien on the premises in controversy in this suit, or any
45 part thereof, & allowing the claim of said Leach, and decreeing its payment.

IV. The court erred in finding that said Hall & Winch had a mechanic's lien on said premises, or any part thereof, & in allowing the claim of said Hall & Winch & in decreeing its payment.

V. The court erred in finding that said A. W. Wheeler had a mechanic's lien on said premises, or any part thereof, & in allowing the claim of said Wheeler & decreeing its payment.

VI. The court erred in not finding the trust deed given to secure the payment of the note held by said Gross, a valid first lien upon the whole of said premises, & in not decreeing that the whole amount due said Gross on said note should be paid out of the proceeds of the sale of said premises, before any of the other claimants in this suit.

THOMAS S. McCLELLAND,
Solicitor for J. Gross, one of said Appellees.

46 And afterwards, to wit, on the nineteenth day of September, A. D. 1877, the same being one of the days of the September term, 1877, of said court, the following, among other proceedings, was had and entered of record, to wit:

THE UNITED STATES MORTGAGE COMPANY *vs.* J. GROSS & ET AL. } 55. Appeal from the superior court of Cook County.

This day this cause coming on to be heard, and it appearing to the court here that a transcript of the record and proceedings of the court below, and also abstracts and briefs have been filed herein in accordance with the rules of this court, it is therefore considered by the court that this cause be now taken under advisement.

And afterwards, to wit, on the twenty-first day of June, 1878, the same being in vacation after September term, 1877, the following, among other proceedings, was had and entered of record, to wit:

THE UNITED STATES MORTGAGE COMPANY *vs.* J. GROSS, MOSES W. POWELL, JOSEPH
47 Hall, Henry A. Winch, Levi L. Leach, Augustus N. Wheeler, Michael Fahey, William Nelson, Samuel Nelson, William C. Baker, J. J. Smith, J. L. Wise, and William A. Reason. } 55. Appeal from the superior court of Cook County.

On this day came again the said parties, and the court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, are of opinion that, in the record and proceedings aforesaid, and in the rendition of the decree aforesaid, there is manifest error; therefore it is considered by the court that for that error and others in the record and proceedings aforesaid the decree of the superior court of Cook County in this behalf rendered be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the superior court of Cook County for such other and further proceedings as unto law and justice shall appertain, with directions to the superior court to enter a decree giving to appellants exclusively the amount found against the city as damages, and to Gross no part thereof.

And it is further considered by the court that the said appellant recover of and from the said appellees its costs by it in this behalf
48 expended, and that it have execution therefor.

And afterwards, to wit, on the twenty-third day of September, A. D. 1879, the same being one of the days of the September term, 1879, of said court, the following, among other proceedings, was had and entered of record, to wit:

THE UNITED STATES MORTGAGE COMPANY *vs.* J. GROSS, MOSES W. POWELL, JOSEPH HALL, Henry A. Winch, Levi L. Leach, August N. Wheeler, Michael Fahey, William Nelson, Samuel Nelson, William C. Baker, J. J. Smith, J. L. Wise, and William A. Reason.	48. R. H. Appeal from superior court of Cook County. Petition for rehearing.

And on this day this cause comes on for hearing upon the petition of said appellees for a rehearing of the same, and the court having duly considered said petition, and being now sufficiently advised in the premises, it is ordered by the court that said petition for a rehearing of this cause be, and the same hereby is, overruled, and a rehearing denied.

And it is further ordered by the court that the opinion filed
49 herein upon the first hearing of this cause, as now modified by the court, be refiled as the opinion of the court now.

And afterwards, to wit, on the third day of March, A. D. 1880, the same being one of the days of the March term, 1880, of said court, the following, among other proceedings, was had and entered of record, to wit:

UNITED STATES MORTGAGE Company *vs.* J. GROSS ET AL.	4. R. H. Appeal from superior court of Cook County. Petition for rehearing.

And now on this day come the said appellees, petitioners herein, by W. C. Goudy and T. S. McClelland, their attorneys, and move the court for leave to file a petition supplemental to their petition for rehearing herein.

Which said motion is, by order of the court, taken under advisement.

And afterwards, to wit, on the fourth day of March, A. D. 1880, the same being one of the days of the March term, 1880, of said court, the following, among other proceedings, was had and entered of record, to wit:

50 THE UNITED STATES MORTGAGE Company *vs.* J. GROSS ET AL.	4. R. H. Appeal from the superior court of Cook County Petition for rehearing.

Now on this day this cause comes on for hearing of the motion of appellees entered herein for leave to file a petition supplemental to their petition for rehearing herein, and the court having duly considered said motion, and being now sufficiently advised in the premises,

It is ordered that said motion be sustained, and that said appellees may file said petition supplemental to their petition for rehearing of this cause heretofore filed.

And afterwards, to wit, on the sixth day of March, A. D. 1880, the same being one of the days of the March term, 1880, of said court, the following, among other proceedings was had and entered of record, to wit:

THE UNITED STATES MORTGAGE COMPANY
vs.
J. GROSS, MOSES W. POWELL, JOSEPH HALL, Henry A. Winch, Levi L. Leach, August N. Wheeler, Michael Fahey, William Nelson, Samuel Nelson, William C. Baker, J. J. Smith, J. L. Wise, and William A. Reason.

4. R. H. Appeal from superior court of Cook County. Petition for rehearing.

51

And now on this day this cause coming on to be heard upon the petition of the appellees for a rehearing herein, and this court now here being duly advised in the premises.

It is considered and ordered by the court that said petition for a rehearing be overruled and denied.

And it is further ordered by the court that the opinion filed herein upon the first hearing of this cause be now modified and refiled as the opinion of the court in this cause, which is done accordingly.

And it is further ordered by the court that said petitioners pay the costs and charges in and about their said petition herein taxed.

And it is further ordered by the court that the order staying proceedings heretofore entered herein be now set aside and held for naught.

52 And afterwards, to wit, on the sixth day of March, A. D. 1880, the same being one of the days of the March term, 1880, of said court, there was filed in the office of the clerk of said court an opinion of said court in said cause; which said opinion is in the words and figures as follows, to wit:

THE UNITED STATES MORTGAGE COMPANY
vs.
J. GROSS ET AL.

4. R. H. Appeal from superior court of Cook County.

Opinion modified and refiled Mar. 6th, 1880.

Opinion by Baker, J., modified.

We will first examine as to the validity of the mortgage executed by Lombard to the United States Mortgage Company. The charter of that company is not incorporated in the record, but from its name, the character of its transaction here involved, and the facts appearing in the case, we may reasonably conclude its principal or sole business was and is to loan money, taking to itself mortgages on real estate to

53 secure the same. The general incorporation law of 1872, which was in force when the mortgage was executed, provided for the formation in the State of companies for any lawful purpose, expressly excepting, however, corporations for banking, insurance, real-estate

brokerage, operation of railroads, and the business of loaning money. Section 26 of the act provided that "foreign corporations, and the officers and agents thereof, doing business in this State, shall be subject to all the liabilities, restrictions, and duties that are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers.

"And no foreign or domestic corporation established or maintained in any way for the pecuniary profit of its stockholders or members, shall purchase or hold real estate in this State, except as provided for in this act."

From these statutory enactments we deduce these conclusions. The latter sentence of section 26 was aimed at the purchasing and holding of real estate by corporations for the reason such acts would tend to create perpetuities; and by this and other provisions of the same act the evil feared was effectually guarded against. We think, however, it was not designed thereby to prevent corporations from taking mortgages on real estate as security for debts. In fact the act contemplates corporations will acquire real estate in satisfaction of indebtedness due them, and makes such provision in the 5th section for the sale of real estate so taken as secures the State against the evil had in legislative view, and which had been discussed by this court in Carroll v. The City of East St. Louis, 67 Ill., 568.

54

Indeed, it is difficult to see how mortgages, which are conveyances subject to conditions of defeasance, can be considered as tending to create perpetuities.

Payments made of the debts thus secured defeat the titles of the mortgagees, and even if they take possession the incomes gradually undermine and destroy their titles. If the premises are sold under powers, the mortg gees cannot themselves become purchasers; and if the mortgages are foreclosed by suit the decree of the court thereafter becomes the basis of title.

But we see from the first sentence of this section 26, it was the policy of the State that foreign corporations should have no other or greater powers in the State than corporations of like character organized under the general laws of the State; and further see, from the first section of the act, it was a part of that same policy that corporations shall not be formed in the State for the business of loaning money.

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It follows that corporations organized in a foreign State for such business of loaning money could not claim to pursue such business in this State. The comity between the States does not demand we should hold this mortgage company, incorporated under an act of the State of New York, could lawfully within this State exercise powers denied to corporations formed within our own borders. All the acts of this company here done in furtherance of such business of loaning money were invalid, as being obnoxious to our policy and institutions.

The act of April 9th, 1875, provides, among other things, that any corporation formed under the laws of any other State or country, and *and* authorized by its charter to invest or loan money, may invest or loan money in this State. And any such corporation that may have invested or lent money, as aforesaid, may have the same rights and powers for the recovery thereof, subject to the same penalties for usury, as private persons, citizens of this State; and when a sale is made under any judgment, decree, or power in a mortgage or deed, such corporation may purchase, in its corporate name, the

56

property offered for sale, and become vested with the title wherever a natural person might do so in like cases. (L. 1875, p. 65.)

It was the evident intention of this latter act not only to change somewhat the policy of the State, but to validate such contracts as that here under consideration. It is urged by appellant, that even if the mortgage was theretofore invalid, it was rendered valid and binding by this act; and by appellee it is contended the act, thus construed, would deprive him of his property without due process of law, and *and* take from him a vested right.

A statute must have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively. Here there is no doubt the statute is retroactive; it is expressly so on its face.

Unless there be a constitutional inhibition, a legislature has power, when it interferes with no vested right, to enact retrospective statutes to validate invalid contracts, or to ratify and confirm any act it might lawfully have authorized in the first instance.

57 We do not deem it necessary to cite any of the many cases where this doctrine has been announced or followed.

In Cooley's Constitutional Limitations, p. 374, it is said, "When such acts go no further than to bind a party by a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law, the question they suggest is one of policy and not one of constitutional power."

Lombard borrowed the money and attempted to make a valid contract of mortgage to secure its payment, and he was, if not legally at least in justice and good con'cience, bound thereby; and it is clear the mortgage might well be validated so far as regards him.

But it is claimed the rights of third persons have intervened which cannot be affected by this legislation.

The true line of distinction is laid down by Cooley in his work on Constitutional Limitations just quoted from. On page 378 and 379, he says,

"The operation of these cases, however, must be carefully restricted to the parties to the original contract, and to such other

58 persons as may succeed to their rights with no greater equities. A subsequent bona fide purchaser cannot be deprived of the property which he has acquired, by an act which retrospectively deprives his grantor of the title which he had when the purchase was made.

"Conceeding that the invalid deed may be made good, as between the parties, yet if, while it remained invalid, and the grantor still retained the legal title to the land, a third person has purchased and received a conveyance, with no notice of any fact which should preclude his acquiring an equitable as well as a legal title thereby, it would not be in the power of the legislature to so confirm the original deed as to divest him of the title he has acquired. The position of the case is altogether changed by this purchase. The legal title is no longer separated from equities, but in the hands of the second purchaser is united with an equity as strong as that which exists in favor of him who purchased first. Under such circumstances even the courts of equity must recognize the right of the second purchaser as best, and as entitled to the usual protection which the law accords to vested interests."

59 We understand the rule to be that where a third party pur-

chases under such state of facts as would preclude his acquiring an equitable as well as a legal title, the legislature may confirm the original contract so as to divest him.

So, here, the National Life Insurance Company had, and has no equity as against the United States Mortgage Company, and bought expressly subject to its equity, and agreed as a part of the purchase money for the premises to pay the debt which was in equity and good morals due from Lombard to the mortgage company.

It would be inequitable and unjust to permit the insurance company, were it here defending against this mortgage, it having agreed to pay $100,173.00 for these lots, the larger portion of which was in the assumption of the debt of Lombard to the mortgage company and secured or attempted to be secured by the mortgage expressly subject to which it purchased, to now hold this valuable property discharged of this debt. It received full consideration for this assumption of the mortgage debt, and to now keep and possess the property released therefrom would be such want of good faith on its part, both towards Lombard, its
60 grantor, whose debt it was paid for assuming, and to appellant, as a court of equity would be loth to sanction. We think it evident the insurance company took the lots with no greater equities than existed in Lombard, the party to the original mortgage contract with appellant.

Great stress is laid by appellee upon the case of Thompson v. Morgan, 6 Minn., 295, and it is said that case is exactly like the one at bar. We do not think the cases are analagous.

Even if we assume the doctrine of that case to be correct, a point it is not deemed necessary to here examine, yet there is a broad and fundamental distinction between the two cases. In that case the court held the mortgage from Folsom to Morgan was inef'ectual to pass an interest in the land, because not executed in conformity with statutory requirements, and that although Folsom afterwards conveyed the premises to Babcock, subject to the Morgan mortgage, and so expressed in the deed, yet he could safely take the title subject to the mortgage, and rely upon the defence that was patent upon its face for protection, and that the curative act of July 26th, 1858, could have no effect to validate the Morgan mortgage to the prejudice of Babcock
61 or of Thompson, who claimed under him. But it will be noted the gist of the case is the mere notice to Babcock, and the question was whether such notice changed his status as regarded the character and defects of the mortgage. And the court said, "Babcock might perhaps have estopped himself from questioning the validity of this mortgage by an appropriate clause in his deed recognizing it as a subsisting lien, and waiving its defects, but the mere admission of notice that such a mortgage existed by a recital of it in this deed, through which he derived his title, would not operate such a consequence." We regard this as a plain intimation by the supreme court of Minnesota, that had this element of a recognition of the mortgage as a lien and waiver of defects appeared in the record, the decision of that case would have been otherwise.

In the case at bar the premises were not only sold subject to the mortgage, but there was an express assumption of the mortgage debt, and a promise to pay that mortgage debt as a part of the consideration of the purchase. The facts of this case go far beyond a mere
62 notice; and beyond even that which seems to have *to have* been deemed sufficient in Thompson v. Morgan.

Although Gross took the note of the National Life Insurance Com-

pany, secured by the second mortgage, before maturity, yet as regards the mortgage or trust deed security, he merely stepped into the shoes of Lombard and the insurance company. He has but an equitable title to the trust deed, to enforce which he has resorted to a court of equity, and he holds such title with all the equities and infirmities existing against it, and has no stronger or better claims under it than his assignor could have claimed. (Darst v. Gale, 83 Ill., 137; Walker v. Dement, 42 Ill., 272; Fortier v. Darst, 31 Id., 212.)

So far as the security for the note is involved, Gross took with notice; he claiming his lien under and through the insurance company and Lombard, is affected by the recitals and covenants in the deed from Lombard to the insurance company to the same extent they were. When he took the trust deed as a security he was chargeable with notice of all equities appearing in the chain of title whereby he acquired a lien under that trust deed, and the equity of the United States
63 Mortgage Company appeared in the deed to the grantor in the trust deed under which he claims.

So the same knowledge imputable to Lombard and the insurance company, is imputable to him, when he stands in the court of equity, seeking relief not as the legal holder of negotiable paper assigned before maturity, but in the attitude so far as concerns the equitable security of an assignee of an equitable title, subject to all the equities and infirmities existing against it in the hands of the original parties to the contract.

Our conclusion is, it was entirely competent for the general assembly to validate the mortgage in question not only as to parties to the original contract, but as to Gross, the assignee of the equitable interest in the trust deed, since, under the circumstances of the case, he has no such equities as will give him a vested right as against the equities of the mortgage company. A party cannot have a vested right contrary to equity and justice.

The other principal question at issue is, who is entitled to the judgment for $10,952.73 against the city?
64 Should that judgment be paid to Gross, the holder of the note secured by the trust deed executed on the premises and delivered to Lombard, in whose favor the waiver clause in the mortgage to appellant was made?

Or should it be paid to appellant, who holds the first mortgage, but took the same with that waiver clause in it?

We think it a misapprehension to say the thirty-five feet of ground, the appropriation of which to the opening and extension of Dearborn street was contemplated, was either omitted or released from the mortgage.

The premises purporting to be conveyed by way of mortgage, were the entire premises, the whole lot and the half lot, and then, after the description of the lots mortgaged, and after the habendum clause was inserted, a provision that if the strip of ground off the west end of the premises should be taken by the city for the purposes of this extension, then, in that event, "any benefit which may accrue to the said party of the first part herein, may be paid by the city to the said party of the first part direct."

What was the intention of the parties to the contract?
65 The whole instrument must be construed together, and this stipulation must be interpreted in the light of the other provisions of the deed. And if the deed is equally susceptible of two interpretations, it is a well established rule, that meaning will be adopted

which is adverse to the interests of the grantor. (City of Alton v. Ill's Transportation Co., 12 Ill., 38.)

Lombard was the general owner of the lots, and for the purpose of securing funds with which to build thereon, he borrowed $50,000 from appellant, and mortgaged the premises. He covenanted to pay the debt and interest, and that the real estate was clear of all incumbrance, and that he would warrant and defend the same, and suffer no impairment of the security of the mortgage company, and that the mortgage should stand as security for any money paid for taxes or insurance, and that on failure to pay any taxes or assessments on said lots, or keep any other covenants, the whole of the debt should become due at the option of the mortgage company.

It is clear from this, it was intended Lombard should pay the benefits assessed against the lots for the proposed improvement, since
66 it was expressly stipulated he should suffer no impairment of the security, and that on his failure to pay any assessment on the premises the whole debt might be declared due. It was evidently contemplated Lombard would continue to hold the lots and building to be erected thereon, and intended the investment of appellant, which was for a term of years, should be kept secure, and that the interest on the loan and taxes, insurance, and assessments on the property should be paid by Lombard. It is also plain, from the mortgage itself as well as from the manner in which the building was constructed, with its main front on Dearborn street as proposed to be extended, and leaving the thirty-five feet unoccupied, it was considered that street would shortly be opened.

If this was done, there would necessarily be benefits assessed against the lots, and on the other hand, compensation allowed the lot-owner.

Lombard was already, by his covenants, bound to pay the assessments levied for benefits and to suffer no impairment of the security held by the company, and this, too, under a heavy penalty, which, if im-
67 posed, would be likely to deprive him of the whole of this valuable property. In that state of the case it was stipulated the benefit which might accrue should be paid to Lombard direct. The several parts of the instrument should be construed together, and thus construing them, we think it manifest it was the understanding Lombard should collect the compensation and at the same time pay the assessments so as to keep the security unimpaired.

The phraseology of the stipulation relied on by Gross is peculiar. After the recitation in reference to the anticipated extension of Dearborn street, the language used is, "in which event any benefit which may accrue to the said party of the first part herein may be paid by the city to the said party of the first part direct."

It is plain the word benefit is not used in the technical sense in which that word is used in the statute. The words compensation and damages are the words there used to indicate the amounts to be paid to the lot-owner by the city, and the word benefit is the word used in the law to indicate the amount to be paid by the lot-owner to the city.

The stipulation is not that the compensation or damages should
68 be paid by the city to Lombard direct.

Now, as we have seen, Lombard was bound by his covenants to pay the assessments for benefits, and suffer no impairment of the security, and he is entitled by the same contract to "any benefit which may accrue to him," he being the general owner. The prospective compensation that would become due from the city, without special provision otherwise would be payable to the mortgage company by virtue

of the lien on the property taken, and would be a credit upon the loan.

This was, therefore, provided against, and as it was at least possible, if not probable, the improvement would result in an excess of compensation over the assessment made on the lot, it was stipulated any benefit which might accrue should be paid to Lombard direct. In other words, if the compensation exceeded the assessment, then a pecuniary benefit would accrue to the lot-owner from the opening of the street, and that instead of being credited on the debt was to go to the owner of the lot; but if, as the event was, the assessment exceeded the compensation for the thirty five feet taken, then no pecuniary "bene-
69 fit" would accrue to the lot-owner from the extension of the street.

It would seem this was the real meaning and understanding of the parties to the contract and the real object in view in inserting the waiver clause. Lombard would thereby not only pay the assessment, but collect the compensation and get the benefit of any surplus of compensation and damages over benefits; the United States Mortgage Company being only interested that the opening of the street would impose no additional burden upon them, and not impair the security they held. We think a consideration of the whole contract, and all its various provisions, in the light of the surrounding facts and circumstances, clearly shows this was the real substance of the arrangement between the parties. It appears the compensation awarded for the portions of the lots taken for the street was $10,952.73, and that the benefits assessed against the remaining portion of the lots were $15,897.84. So that if Lombard had in good faith performed his contract made with the appellant company, not only would the whole of the compensation been absorbed in paying the assessment, but he would have been obliged
70 to pay $4,945.11, in addition thereto.

The rules of equity do not require he should be allowed a premium for his breach of contract. If Lombard himself were here in a court of equity claiming this fund of $10,952.73, and at the same time admitting his failure to pay either debt, interest, insurance, taxes, or even the assessment of benefits growing out of the self-same improvement from which that fund originated, and casting back upon appellant the mortgaged property thus incumbered and the security thus impaired, his claim would only be enforced by setting it off against the above-mentioned just demands against him. It also appears from the record he is insolvent and a bankrupt, and that no assets of his are known to exist, and that the National Life Insurance Company is in like predicament, and that the mortgaged premises are not worth the amount due on the mortgage and the special assessments on the lots.

These latter facts but intensify the case to show the rank injustice that would be done in giving this fund to either Lombard or the insurance company were either he or it here asking therefor.

71 But it is claimed this view overlooks the right and position of Gross. That position and those rights we have considered in connection with the other branch of the case.

We have seen that, as regards the trust-deed, he bought that which was not assignable at law, and with notice of the equities of the mortgage company, and took that security subject to all the infirmities to which it would have been liable in the hands of Lombard or the insurance company.

When recourse is had to a court of chancery, such assignment will not cut off prior and stronger equities against the same fund. It is also claimed the damages arising from the taking of these thirty-five

feet of the lots by the city cannot be set off against the benefits assessed against the remaining part of the lots, and the decision of this court in Carpenter v. Jennings et al., 77 Ill., 250, is referred to in that connection. The question there considered was as to the constitutional powers of commissioners of highways in laying out a public road, while this case involves no such inquiry, but the validity and construction of a contract, and the equities of appellant and appellees respectively. The adjudication of the claims of the mechanics
72 and material men was right.

The decree must be reversed on the assignments of error made by The United States Mortgage Company; and the cause is remanded for further proceedings consistent with this opinion.

Reversed & remanded.

WALKER, *J.*,

I am unable to concur in the conclusion of the majority of the court in this case. Even if the general assembly has the constitutional power to validate this void contract which I will not now consider, I hold it had no power to make it a binding contract as to Gross, who could not know that the general assembly would render the void contract binding when he purchased. He may be liable in equity to his grantor for so much of the mortgage held by appellant which he agreed to pay as a part of the consideration of the purchase, but I hold the general assembly had no power to require him to pay the void mortgage held by the mortgage company which was void, and being so, was no lien on the property. The general assembly, I think, had no power to create a lien by declaring it valid.

73 And afterwards, to wit, on the twenty-fourth day of March, A. D. 1880, there was filed in the office of the clerk of said court, a certain certificate of the chief justice of said court, which is in the words and figures as follows, to wit:

In the supreme court of Illinois.

UNITED STATES MORTGAGE COMPANY *vs.* J. GROSS ET AL. } Appeal from the superior court of Cook County.

This certifies that in the above case one of the appellees J. Gross claimed that the mortgage which he held was superior to that of the United States Mortgage Company, and a first lien upon the premises in controversy in this suit, and that in so far as the act of the legislature of the State of Illinois, entitled "An act to enable corporations in other States and countries to lend money in Illinois, to enforce their securities and acquire title to real estate as security," approved April 9, 1875, and in force July 1, 1875, attempted to validate the mortgage of the United States Mortgage Company and make it a paramount lien to the mortgage
74 purchased by Gross, the said act was in conflict with so much of section 10, article 1, of the Constitution of the United States as prohibits a State from passing a law impairing the obligation of a contract; and of so much of section 1, article 14, of the Constitution of the United States as prohibits a State from depriving any person of property without due process of law; and that said claim was decided adversely to said Gross, by the said supreme court of the State of Illinois, and such fact is hereby duly certified.

It is further certified that questions are involved in this cause touching the rights of said Gross, under the Constitution of the United States, to the end that said Gross may prosecute such questions to the Supreme Court of the United States for adjudication.

Witness the honorable Pinkney H. Walker, chief justice of the supreme court of the State of Illinois, this 24th day of March, in the year of our Lord one thousand eight hundred and eighty.

P. H. WALKER,
Chief Justice of the Supreme Court of the State of Illinois.

(Upon which is endorsed, as follows:) Filed Mar. 24, 1880. E. F. Dutton, clerk.

75 And afterwards, to wit, on the eighteenth day of April, A. D. 1880, the following bond for costs was filed in the office of the clerk of said court, which said bond is in the words and figures, following, to wit:

Know all men by these presents that we, J. Gross and Thomas S. McClelland, are held and firmly bound unto the United States Mortgage Company in the sum of two hundred dollars, to be paid to the United States Mortgage Company, its successors or assigns; for which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 31st day of March, 1880.

Whereas the above bounden, J. Gross, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment and decree rendered in the suit of said United States Mortgage Company against said J. Gross, impleaded with Kirk Hawes and others, by the supreme court of the State of Illinois:

Now, therefore, the condition of the above obligation is such that if said J. Gross shall prosecute his said writ of error with effect, and answer all damages and costs if he shall fail to make good his plea, then

76 this obligation shall be void; otherwise the same shall remain in full force and virtue.

JAAZANIAH GROSS. [SEAL.]
THOMAS S. McCLELLAND. [SEAL.]

Security satisfactory.

WIRT DEXTER,
Sol'r U. S. Morty. Co.

4, 7, '80.

Counsel for defendant in error having expressed himself satisfied with this bond, I hereby approve the same.

April 20, 1880.

P. H. WALKER,
Ch. J. Supr. Court Ill.

STATE OF MASSACHUSETTS,
Suffolk County, ss:

On this third day of April, A. D. 1880, before me, a notary public in and for said county, in the State aforesaid, personally came J. Gross, personally known to me to be the same person whose name is subscribed to the foregoing bond, and acknowledged that he executed the same for the uses and purposes therein expressed.

[NOTARIAL SEAL.]

WM. HOBBS,
Notary Public.

77 STATE OF ILLINOIS,
Supreme Court, Northern Grand Division:

I, Ewerell F. Dutton, clerk of the supreme court in and for the northern grand division of the State of Illinois, do hereby certify that the foregoing is a true, perfect, and complete copy of the record and proceedings in a certain cause lately pending in said court, wherein the United States Mortgage Company was appellant, and J. Gross appellee, except the original opinion filed in said cause on June 21st, 1878, and a modified opinion therein, filed Sept. 23d, 1879.

In testimony whereof I have set my hand and affixed the seal of the said supreme court at Ottawa, this 20th day of April, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] E. F. DUTTON, *Clerk.*

78 UNITED STATES OF AMERICA,
State of Illinois:

I do hereby certify that the annexed certificate and attestation of Ewerell F. Dutton, are in due form of law; and I do further certify that he is the clerk of the supreme court for the northern grand division of the State of Illinois, and that his signature to said certificate is genuine.

Given at Rushville, Illinois, April 24th, 1880.

P. H. WALKER,
Chief Justice of the Supreme Court of the State of Illinois.

79 UNITED STATES OF AMERICA, *ss:*

The United States of America, to the honorable the judges of the supreme court of the State of Illinois, greeting:

Because the records and proceedings, and also in the rendition of the judgment of a plea, which is in said supreme court before you or some of you, being the highest court of law and equity of the said State of Illinois, in which a decision could be had in the said suit between J. Gross, impleaded with Kirk Hawes and others, and the United States Mortgage Company, wherein was drawn in question the validity of a statute of the said State of Illinois, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such its validity; also, wherein was drawn in question the construction of clauses of the Constitution of the United States, and the decision was against the rights of said Gross specially set up and claimed under such clauses of the said Constitution, a manifest error has happened to the great damage of said J. Gross, as by his complaint appears.

We being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to laws and customs of the United States should be done.

80

Witness the honorable Morrison R. Waite, Chief Justice of the said

Supreme Court, the 17th day of April, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] WM. H. BRADLEY,
Clerk of the Circuit Court of the United States for the Northern District of Illinois.

(Indorsed:) Writ of error.

81 UNITED STATES OF AMERICA, *ss:*

To the United States Mortgage Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, on the second Monday of October next, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Illinois, at Ottawa, in the northern grand division, wherein J. Gross, impleaded with Kirk Hawes and others, is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgement in the said writ of error mentioned should not be corrected, and speedy justice should be done to the parties in that behalf.

Witness the honorable Pinkney H. Walker, chief justice of the supreme court of the State of Illinois, this 20th day of April, in the year of our Lord one thousand eight hundred and eighty.

P. H. WALKER,
Chief Justice of the Supreme Court of the State of Illinois.

Service of above accepted this 21st day of April, A. D. 1880.

WIRT DEXTER,
Sol'r for U. S. Mortgage Co.
THE UNITED STATES MORTGAGE CO.,
By ALFRED H. SANSOM, *Agent.*

(Indorsed:) Citation.

82 UNITED STATES OF AMERICA, *ss:*

Supreme Court of the United States, October term, A. D. 1880.

J. GROSS, IMPLEADED, &C., PLAINTIFF IN error, *vs.* THE UNITED STATES MORTGAGE COMPANY, defendant in error.	Writ of error to the supreme court of the State of Illinois.

Assignment of errors by pl'ff in error, J. Gross.

1. The said supreme court of the State of Illinois erred in said cause in deciding and adjudging that the act of the legislature of the State of Illinois, entitled "An act to enable corporations in other States and countries to lend money in Illinois, to enforce their securities, and acquire title to real estate as security," approved April 9, 1875, and in force July 1, 1875, was valid and operated to validate the mortgage given to the United States Mortgage Company, dated August 22, 1872, and to make it a superior lien, upon the premises in controversy, to the lien of Gross acquired by the mortgage on the same property, dated December 10, 1872, as shown by the record herein.

2. The said supreme court of the State of Illinois erred in said

83 cause by not holding that said act of 1875, in so far as it purported to impair the vested rights of said Gross in and to said premises, was a violation of section 10, article 1, of the Constitution of the United States was and is unconstitutional and invalid.

3. The said supreme court of the State of Illinois erred in not adjudging and deciding that said act of 1875 was in derogation of section 1, article 14, of the Constitution of the United States, and wholly void as to said Gross, who had acquired vested rights before that act went into force.

4. The said supreme court of the State of Illinois erred in said cause by not deciding that said Gross had a valid first lien upon said premises and superior to the lien of said United States Mortgage Company, whose contract of mortgage was originally void and duly became a lien upon said premises by reason of the passage of said act of 1875.

5. The said supreme court of the State of Illinois erred in deciding said cause against said Gross, whose rights were and are protected by the Constitution of the United States.

6. The supreme court of Illinois erred in finding for the United States Mortgage Company & in not finding for Gross.

THOMAS S. McCLELLAND,
Counsel for Pl'ff in Error.

(Indorsed:) U. S. Mort. Co. vs. Gross. Assig'ment of errors.

84 UNITED STATES OF AMERICA, *ss:*

Supreme Court of the United States, October term, A. D. 1880.

J. GROSS, PLAINTIFF IN ERROR,
vs.
UNITED STATES MORTGAGE COMPANY, DEFENDANT IN ERROR. } Writ of error to supreme court of the State of Illinois.

I hereby enter my appearance as counsel for the above-named J. Gross, plaintiff in error, in said cause.

THOMAS S. McCLELLAND,
Counsel for said J. Gross.

(Indorsement on cover:) No. 511. J. Gross, plaintiff in error, vs. The United States Mortgage Company. Illinois sup. court. Filed 13th May, 1880.

108-477

OFFICE SUPREME COURT U. S.
FILED
FEB 12 1883
JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT OF UNITED STATES.

OCTOBER TERM, A. D. 1882.

J GROSS,
Plaintiff in Error,
vs.
THE UNITED STATES MORTGAGE COMPANY,
Defendant in Error.

Error to the Supreme Court of Illinois.

Argument and Brief for Plaintiff in Error.

THOMAS S. McCLELLAND,
Of Counsel for Plaintiff in Error.

CHICAGO:
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1883.

IN THE

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, A. D. 1882.

J GROSS,
Plaintiff in Error,
vs.
THE UNITED STATES MORTGAGE COMPANY,
Defendant in Error.

Error to the Supreme Court of Illinois.

STATEMENT OF FACTS.

The premises in controversy in this suit are described as the south half of Lot 12 and Lot 13, Block 139, School Section Addition to Chicago, and are shown on a plat at page 10 of the record.

On August 22, 1872, Benjamin Lombard, then the owner, executed to the defendant in error—a corporation organized under the laws of New York for the purpose of loaning money, and having its principal office in New York city—a mortgage upon these lots, to secure a building loan of $50,000. This mortgage contained covenants that the premises were free of incumbrances, and that the grantor would warrant and defend the same, and suffer no

impairment of the security, and that the mortgage should stand as security for any advances for taxes or insurance, and, in default of payment of taxes or interest, the mortgage company might foreclose and sell, under the power contained in the mortgage.

The mortgage was filed for record in the Recorder's office of Cook County, wherein the land was situated, on the same day.

Between that date and February 24, 1873, the mortgage company advanced to Lombard $47,000, with which he erected a building on the lots.

This mortgage contained the following provision, or waiver clause:

" It is understood and agreed that this mortgage is to " be subject to the right of the city to take so much of " said lots as shall be necessary for the opening and ex- " tension of Dearborn street, being 36 feet, more or less, " off the west end of said premises; in which event any " benefit which may accrue to the said party of the first " part (Lombard) herein may be paid by the city to " said party of the first part direct."

On December 10, 1872, Lombard sold and conveyed the entire premises to the National Life Insurance Company, of Chicago, for $100,173.00, a part of which was the assumption of this mortgage debt, and on the same day the insurance company executed to its own order, and endorsed the same in blank, its note for $12,273.00, as part of the purchase money, and to secure the same executed a trust deed on the premises, which was duly filed for record in the Recorder's office of Cook County. This note and trust deed were delivered to Lombard, who negotiated the same, and soon thereafter, and before maturity, Gross, the plaintiff in error, became the owner

for a valuable consideration, and without notice of any adverse equities.

On April 23, 1874, judgment was rendered against the city of Chicago in the sum of $10,952.73, for taking the west thirty-five feet of the lots for the opening and extension of Dearborn street, and the same day an assessment of $15,897.84 was levied upon that part of the lots not taken for a street, as benefits to the same.

Lombard became insolvent and failed to pay taxes or assessments on the property, and all interest on his loan from the defendant in error, from and after Oct. 1, 1873, as well as the principal.

The National Life Insurance Company also became insolvent and on June 1, 1874, it was adjudged a bankrupt, and Kirk Hawes was appointed its assignee.

For the purpose of adjusting the respective rights of the several persons claiming interests in this property, and to fix by decree of court, the priority of liens, the assignee, upon his appointment, filed his bill in chancery in the Superior Court of Cook County against Gross, the United States Mortgage Company, the city of Chicago, and others.

Gross filed a cross-bill against the assignee, the mortgage company, the city, and others, claiming the judgment of $10.952.73, rendered against the city for taking the 35 feet, and also claiming a valid first lien upon the balance of the land for the amount due him, on the ground that the mortgage from Lombard to defendant in error was absolutely void at the time he acquired the title to the $12,273.00 note and trust deed of the insurance company, the mortgage company being a foreign corporation and incapable of taking title to real estate in Illinois, as security or otherwise.

On April 27, 1876, a final decree was entered in the cause by the Superior Court, in and by which it was decreed that Gross was entitled to the amount of the judgment against the city, because the mortgage to defendant in error contained a waiver of any such damages in favor of Lombard, the grantor in that mortgage, who subsequently conveyed his interest in such damages to the insurance company, and the insurance company, in turn, conveyed the same to the trustee of Gross, the holder of the note secured by the trust deed.

The Superior Court also decreed, that although the mortgage company was a foreign corporation, it took a valid mortgage, and had a prior lien to Gross upon that part of the lots not taken for a street.

At the time this decree was rendered, there was due on the note held by Gross the sum of $16,159.45, and there was then due the United States Mortgage Company on its note $70,000.

From this decree the mortgage company prayed an appeal to the Supreme Court of Illinois.

Gross filed cross-errors in the Supreme Court. (*Record, p. 17.*)

The questions in dispute between Gross and the mortgage company were, first, whether the mortgage company, a foreign corporation, acquired any valid interest in the land as against Gross; and, second, whether the $10,952.73 damages against the city should not be set off against the $15,897.84 benefits to the balance of the property not taken, and, if not, whether Gross should receive such damages or the mortgage company. (*Record, p. 13.*)

On June 21, 1878, an order was entered in the Supreme Court reversing that part of the decree of the

Superior Court giving to Gross the judgment against the city, and affirming it in all other respects (*Record, p. 18*).

Mr. Justice BAKER delivered the opinion of the court, holding the mortgage to the mortgage company void when made, and that it was cured by the act of 1875. (*Record, pp 20–27*).

Under the rulings in that opinion, Gross was cut off from the rights he had acquired by reason of the *waiver clause*, exempting the west thirty-six feet from the operation of the mortgage made by Lombard to the defendant in error herein, and Gross' claimed priority of lien upon the whole of the premises to that of the mortgage company, by reason of the invalidity of the mortgage from Lombard to it, was denied to him, on the ground that the Legislature of Illinois, by an act in force July 1, 1875, entitled "An act to enable corporations in other States and countries to lend money in Illinois, to enforce their securities, and acquire title to real estate as security," validated that mortgage, which act was passed after Gross had acquired vested rights in and to the note and trust deed held by him.

See opinions and certificate, *Record, p. 27*.

From the rulings of the Supreme Court of Illinois, Gross has taken out a writ of error to this court, and assigns the following errors :

ASSIGNMENTS OF ERROR.

1. The Supreme Court of Illinois erred in deciding and adjudging that the act of the Legislature of the State of Illinois, entitled "An act to enable corporations in "other States and countries to lend money in Illinois, to "enforce their securities, and acquire title to real estate as "security," approved April 9, 1875, and in force July 1,

1875, was valid, and operated to validate the mortgage given to the United States Mortgage Company, dated August 22, 1872, and to make it a superior lien, upon the premises in controversy, to the lien of Gross acquired by the trust deed on the same property, dated December 10, 1872.

2. The Supreme Court of Illinois erred in not holding that said act of 1875, in so far as it operated to impair the vested rights of Gross in and to the premises, was in violation of Section 10, Article 1 of the Constitution of the United States, and wholly unconstitutional and invalid.

3. The Supreme Court of Illinois erred in not deciding that said act of 1875 was in derogation of Section 1, Article 14 of the Constitution of the United States, and void as to Gross, who had acquired vested rights before that act went into force.

4. The Supreme Court of Illinois erred in not deciding that Gross had a valid first lien upon the premises in controversy, superior to the lien of the mortgage held by the United States Mortgage Company, whose contract of mortgage was originally void, and only became a lien by virtue of the act of 1875, which could not be retroactive so as to cut off vested rights of Gross.

5. The Supreme Court of Illinois erred in holding that the United States Mortgage Company had any interest in the judgment for damages against the city of Chicago for taking thirty-five feet off the west end of the premises in controversy, which was absolutely waived by the mortgage company, the right to which damages having vested in Gross prior to the time when the mortgage company was enabled to acquire title to real property in Illinois, by mortgage or otherwise.

6. The Supreme Court of Illinois erred in not sustaining the cross-errors filed by Gross before it, whose rights were and are protected by the Constitution of the United States.

7. The Supreme Court of Illinois erred in finding for the United States Mortgage Company and against Gross.

POINTS AND AUTHORITIES.

I.

In the case at bar the Supreme Court of Illinois has decided that the United States Mortgage Company could not loan money in Illinois, and take real estate security, and that the mortgage made by Lombard to it August 22, 1872, was absolutely void and of no effect, both in law and equity.

On that question this court will treat the ruling of the Illinois court as the law of this case, and no subsequent rulings of the Illinois court can be considered here.

Sibbald v. *United States*, 12 Peters, 488.
Tyler v. *Maguire*, 17 Wall. 283 and cases cited.
Roberts v. *Cooper*, 20 Howard, 467–81.
Leese v. *Clark et al.*, 20 Cal. 416.
Phelan v. *San Francisco*, Ibid. 39.
Chickering v. *Failes*, 29 Ill. 294.
Rising v. *Carr*, 70 Ill. 596.
C. & A. R. R. Co. v. *People*, 72 Ill. 82.
Johnson v. *Von Kettler*, 84 Ill. 315.
Clearklee v. *Mundell*, 4 Harr. and John. 497.

Irrespective of this rule of law, there is another, to wit, that this court, in passing on local questions peculiar to the several States, will adopt the rulings of such State courts as settled at and before the time the transaction occurred which is brought in review before this court, and subsequent decisions of the State court can have no force or effect upon such transactions.

Fairfield v. *County of Gallatin*, 100 U. S. 52.

It is reserved to the States, either by statute or general policy, to determine whether foreign corporations shall do business therein.

Newburg Petroleum Co. v. *Weare*, 27 Ohio St. 351.
Drake v. *Doyle*, 40 Wis. 175.
Drake v. *Ins. Co.*, 94 U. S. 535.
Wharton on Conflict of Laws, § *286*.
Bank of Augusta v. *Earle*, 13 Peters, 589.
Runyan v. *Coster*, 14 Peters, 129, 130.
Story on Conflict of Laws, § *430*.
Paul v. *Virginia*, 8 Wallace, 168.
County of San Matteo v. *Southern Pacific R. R. Co.*, 13 Fed. Rep. 747.

Such corporations as defendant in error were prohibited in Illinois at the time it took its security by statute and general policy.

Gen. Incorp. Law of Ill. of 1872, Secs. 1 and 26.
U. S. Mort. Co. v. *Gross, per Baker*, Record p 20.

The contract of mortgage by Lombard to defendant in error being prohibited by statute, and against the manifest policy of the State, is a nullity.

Cin. Ins. Co. v. *Rosenthal*, 55 Ill. 91.

Carroll v. *East St. Louis*, 67 Ill. 577.
Starkweather v. *Bible Soc.*, 72 Ill. 50.
U. S. Trust Co. v. *Lee*, Ibid. 143.

The trust deed of Gross is a contract and cannot be postponed to another lien by the Legislature.

Sinking Fund v. *Northern Bank*, 1 Metcalf, (Ky.) 174.
Mundy v. *Monroe*, 1 Manning (Mich.) 68.

II.

The act of July 1, 1875, and the decision of the Supreme Court of Illinois, construing it as retroactive and giving it the effect of curing the mortgage of August 22, 1872, from Lombard to defendant in error, and making that instrument valid as against the note for $12,273, dated December 10, 1872, secured by trust deed and assigned to Gross before maturity, for a valuable consideration without notice, and before the act of 1875 was passed, are in conflict with Article 1, Section 10 and Article 14, Section 1 of Constitution of the United States.

Const. of the U. S., Art. 1, Sec. 10.
Ibid, Art. 14, Sec. 1.
Cooley's Const. Lim. 4th Ed. 472.
Thompson v. *Morgan*, 6 Minn., 292.
Alabama Life Ins. & Trust Co. v. *Boykin*, 38 Ala., 510.
Dale v. *Metcalf*, 9 Penn. State R. 109.
Orton v. *Noonan*, 23 Wis. 103.
Brinton v. *Seevers*, 12 Iowa, 391.
Russell v. *Ramsey*, 35 Ill. 363.
Conway v. *Cable*, 37 Ill. 82.

Deininger v. *McConnell*, 41 Ill. 228.
Rogers v. *Higgins*, 48 Ill. 211.
Bronson v. *Kinzie*, 1 Howard, 311.
Edwards v. *Kearzey*, 96 U. S., 595.
Brine v. *Insurance Co.*, 96 U. S., 627.
McCracken v. *Hayward*, 2 Howard, 608.
Barings v. *Dabney*, 19 Wall. 1.
Curran v. *Arkansas*, 15 How. 304.
Meighen v. *Strong*, 6 Minn. 177.
Shonk v. *Brown*, 61 Penn. State, 321.
Pearce's Heirs v. *Patton*, 7 B. Monroe, 162.
McCarty v. *Hoffman*, 23 Penn. State, 508.
LeBois v. *Bramel*, 4 Howard, 449.
Rose et al. v. *Sanderson*, 38 Ill. 247.
Hunter v. *Hatch*, 45 Ill. 178.
Norman v. *Heist*, 5 Watts & Serg. 173.
Wright v. *Hawkins*, 28 Texas, 452.
Sherwood v. *Fleming*, 25 Texas, (supp.) 408.
Williamson v. *N. J. R R.*, 29 N. J. Eq. 311.
Smith v *Morse*, 2 Cal. 524.
Garnett v. *Stockton*, 7 Humph. 84.
Ballard v. *Ward*, 89 Pa. St. 358.
Bolton v. *Johns*, 5 Barr 145.

The law of the State where a contract is made is a part of the contract, and a subsequent act changing the law to the prejudice of either party is void.

Bronson v. *Kinzie*, 1 How. 311.
Brine v. *Ins. Co.*, 96 U. S. 627.
Edwards v. *Kearzey*, 96 U. S. 601.
Van Hoffman v. *Quincy*, 4 Wall. 535.
McCracken v. *Hayward*, 2 How. 608.
Smoot v. *Lafferty*, 2 Gilm. 383.

And the remedy on such a contract cannot be taken away or materially affected.

Edwards v. *Kearzey*, 96 U. S. 601.
Gunn v. *Barry*, 16 Wall. 610.
Bronson v. *Kinzie*, 1 How. 311.
Mundy v. *Monroe*, 1 Manning (Mich.) 68.
Williamson v. *N. J. R. R.*, 29 N. J. Eq. Rep. 311.

As to construction of retrospective statutes:

Bruce v. *Schuyler*, 4 Gilm. 221.
Marsh v. *Chestnut*, 14 Ill. 227.
Hatcher v. *Toledo R. R.*, 62 Ill. 480.
In re Fuller, 79 Ill. 99.
Garrett v. *Wiggins*, 1 Scam. 336.
Thompson v. *Alexander*, 11 Ill. 55.
Hopkins v. *Jones*, 22 Ind. 310.
Hackley v. *Sprague*, 10 Wend. 116.
Shonk v. *Brown*, 61 Pa. St. 321.
Moore v. *Phillips*, 7 M. and W. 536.
Moon v. *Durden*, 2 Ex. 22.

III.

The assignee of a promissory note before maturity, secured by a trust deed, takes it relieved of any equities existing between the original mortgagor and third persons.

Carpenter v. *Longan*, 16 Wall. 271.
Kennicott v. *Supervisors*, Ibid. 452.
New Orleans, Etc. v. *Montgomery*, 95 U. S. 18.
Sawyer v. *Pickett*, 19 Wall. 146–166.

The decision of the Supreme Court of Illinois, as to the nature of the right acquired by Gross to the security of

the trust deed made by the insurance company, and as to whether it is such a right as could be impaired or destroyed by State legislation, is reviewable in this court; and this court will determine for itself, by reference to the general rules of law appertaining to the subject, as to the nature and extent of that right, and whether it is a right of property protected by the Constitution of the United States.

Delmas v. *Insurance Co.*, 14 Wall. 661.
University v. *People*, 9 Otto, 309–321.
Jefferson Bank v. *Skelly*, 1 Black, 436.
Bridge Proprietors v. *Hoboken*, 1 Wall. 144.

IV.

Subsequent to the execution of the mortgage from Lombard to the mortgage company, and before July 1, 1875, the date of the act under which the mortgage company could lend money in Illinois and take real estate securities, the city of Chicago condemned the west 35 feet of the property, and a judgment was rendered against it for $\$10{,}952\frac{73}{100}$, as the value of the 35 feet, which damages, by the terms of the mortgage, were to go to Lombard direct, but Lombard having sold the entire property —including this 35 feet—to the insurance company, and the insurance company having executed a trust deed on the entire property to secure the [illegible] bought by Gross, it follows that Gross acquired all of Lombard's interest in these damages.

These rights were vested in Gross, and under Section 10, Article 1, and Section 1, Article 14 of the Constitution of the United States, could neither be effected by the act of July 1, 1875, nor by the construction given it by the Illinois Supreme Court in this case.

ARGUMENT.

MAY IT PLEASE THE COURT:

1.

The controversy in this case arises out of the passage of a law by the Legislature of the State of Illinois, entitled "An Act to enable corporations in other "States and countries to loan money in Illinois, to en- "force their securities, and acquire title to real estate as "security," approved April 9, 1875, and in force July 1, 1875, and the construction given to the act by the Supreme Court of the State of Illinois. The plaintiff in error claims that such law as construed by the court is in conflict with Sec. 10, Art. 1, and Sec. 1, Art. 14 of the Constitution of the United States, prohibiting the States from passing any law impairing the obligation of contracts, or from making or enforcing any law which shall deprive any person of his property without due process of law.

The following is the text of the act:

AN ACT *to enable corporations in other States and countries to lend money in Illinois, to enforce their securities and acquire title to real estate as security.*

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That any corporation formed under the laws of any other State or country, and authorized by its charter to invest or loan money, may invest or loan money in this State. And any such corporation that may have invested or lent money, as aforesaid, may have the same rights and powers for the recovery thereof, subject to the same penalties for usury, as private persons, citizens of this State; and when a sale is made under any judgment, decree or power in a mortgage or deed, such corporation may purchase, in its corporate name, the property offered for sale, and become vested with the title wherever a natural person might do so in like cases: *Provided, however*, that all real estate so purchased by any such corporation, in satisfaction of any such liability or indebtedness, shall be offered at public auction, at least once every year, at the door of the court house of the county wherein the same may be situated, or on the premises so to be sold, after giving notice thereof for at least four consecutive weeks, in some newspaper of general

circulation, published in said county; and if there be no such newspaper published therein, then in the nearest adjacent county where such newspaper is published; and said real estate shall be sold whenever the price offered for it is not less than the claim of such corporation, including all interest, cost and other expenses: *And, provided, further*, that in case such corporation shall not, within such period of five years, sell such lands, either at public or private sale, as aforesaid, it shall be the duty of the State's attorney to proceed by information, in the name of the People of the State of Illinois, against such corporation, in the Circuit Court of the county within which such land, so neglected to be sold, shall be situated, and such court shall have jurisdiction to hear and determine the fact, and to order the sale of such land or real estate, at such time and place, subject to such rules as the court shall establish. The court shall tax, as the fees of the State's attorney, such sum as shall be reasonable; and the proceeds of such sale, after deducting the said fees and costs of proceedings, shall be paid over to such corporation: *And, provided, further*, that nothing in this act contained shall be so construed as to confer banking powers or privileges upon any such corporation.

Approved April 9, 1875. In force July 1, 1875.

In giving an interpretation to this act the Supreme Court of Illinois, in its opinion at page 22 of the record, says: "A statute must have a prospective operation "only, unless its terms show clearly a legislative inten- "tion that it should operate retrospectively. *Here, there* "*is no doubt, the statute is retroactive;* it is *expressly so on* "*its face.*"

On page 24 of the record, the court says: "Our "conclusion is, it was entirely competent for the General "Assembly to validate the mortgage in question, not only "as to parties to the original contract, but as to Gross, "the assignee of the equitable interest in the trust deed, "since, under the circumstances of the case, he has no "such equities as will give him a vested right as against "the equities of the mortgage company."

Without discussing the principles or quoting the authorities which led the Illinois court to arrive at their conclusions, that at the time the mortgage company took its mortgage in August, 1872, that instrument was void at law and in equity, and conveyed no title or lien, and

that the act of July 1, 1875, was retroactive and cured that invalid instrument and cut off the legal and equitable rights of Gross, acquired by his note and trust deed of December 10, 1872, it will be taken as the law of this case, *that such mortgage was in fact void at the time it was executed, and at the time Gross purchased his note and trust deed, December 10, 1872.* This court will only inquire whether the act of 1875 in itself, or as construed by the Supreme Court of the State of Illinois, in the case at bar, is in conflict with any provision of the Federal Constitution, which would protect Gross in his rights acquired under his purchase of the note and trust deed of December 10, 1872. Any subsequent rulings of the Illinois court on the general question different in character, can have no force or effect, and will be inapplicable in the argument of this case.

The decision of the Supreme Court of Illinois, holding that the mortgage to defendant in error was void because it was made in violation of the laws of Illinois prohibiting defendant in error from taking the same, is not reviewable in this court, it not being a "Federal question;" and such decision is the settled law of this case, and it is not affected in the least by the fact that the Supreme Court of Illinois has, in another case, between different parties and involving another subject matter, decided years after this case was finally determined, given a different construction to the laws of Illinois on the right of a foreign corporation to take mortgage securities in Illinois.

Should the case again come before the Supreme Court of Illinois, it would still hold in this case the views it has expressed as the law of the case, and would not review its own decision as herein announced.

Authorities to sustain this point are cited in the brief.

This rule of practice, I believe, has no exceptions.

Thus the rule is laid down in *Sibbald* v. *United States*, 12 Peters, 488; *Tyler* v. *Maguire*, 17 Wall. 283; *Leese* v. *Clark et al.*, 20 Cal. 416; *Phelan* v. *San Francisco*, 20 Cal. 39, and in various cases cited.

2.

Having shown that the mortgage from Lombard to the United States Mortgage Company, dated August 22, 1872, was void in law and equity, and conveyed no title whatever, and so continued until it received vitality by virtue of the act of July 1, 1875, what effect had that act, or the construction of it by the Supreme Court of Illinois, upon the property interests of Gross, acquired under his purchase of the note for $12,273, secured by a trust deed dated December 10, 1872, on the same property as that described in the mortgage? If the effect was to cure the illegal mortgage, to make valid that which was void, and known to be void when Gross bought, then it must be repugnant to the Constitution of the United States.

Among the powers prohibited to the States, that of passing any law impairing the obligations of contracts is clearly set forth in section 10, article 1 of the Federal Constitution; and section 1, article 14 of the same instrument, as clearly prohibits any State from making or enforcing any law which shall deprive any person of his property, without due process of law.

The tenor of the decision of the Supreme Court of Illinois is, that when Gross purchased the note and trust deed in 1872 he could, at any time before the act of 1875

was passed, have gone into a court of chancery and enforced it as against the mortgage of defendant in error. The effect of the act of 1875, as decided by the Illinois court, is to deprive Gross of this right and to make his mortgage inferior to that of defendant in error. Before the act of 1875, Gross held, in law and in equity, the first, superior, and, so far as defendant in error is concerned, the only lien on the mortgaged estate. The Illinois court now holds, that by virtue of the act of 1875, the mortgage company's mortgage became superior to that owned by Gross. This act cannot have such effect, and so far as it was intended to have such operation, it is in conflict with the first provision of the Federal Constitution above referred to, and void.

In *Bronson* v. *Kinzie*, *supra*, it appeared that after the mortgage on land in Illinois, which Bronson sought to foreclose, was made, the Legislature passed a law providing for redemption of property sold under decrees of court in foreclosure cases, and a law providing for a valuation of the property before sale, and prohibiting a sale for less than two-thirds of the amount of such valuation.

The United States Supreme Court held these laws void, so far as they applied to mortgages made before they were passed.

We quote, from its opinion, the language of which is applicable to the case at bar: "As concerns the obligations of the contract upon which this controversy has arisen, they depend upon the laws of Illinois as they stood at the time the mortgage deed was executed. But the mortgage given to secure the debt was made in Illinois, for real property situated in that State, and the rights which the mortgagee acquired in the premises depended upon the laws of that State. In other words,

" the existing laws of Illinois created and defined the legal " and equitable obligations of the mortgage contract.

" If the laws of the State, passed afterwards, had done " nothing more than change the remedy upon contracts of " this description, they would be liable to no constitu- " tional objections. For, undoubtedly, a State may regu- " late at pleasure the modes of proceeding in its courts " in relation to past contracts, as well as future. It may, " for example, shorten the period of time within which " claims shall be barred by the statute of limitations. It " may, if it thinks proper, direct that the necessary im- " plements of agriculture, or the tools of the mechanic, or " articles of necessity in household furniture, shall, like "wearing apparel, not be liable to execution or judg- " ment. Regulations of this description have always been " considered, in every civilized community, as properly " belonging to the remedy, to be exercised or not, by " every sovereignty, according to its own views of policy " and humanity. It must reside in every State, to enable " it to secure its citizens from unjust and harassing litiga- " tion, and to protect them in those pursuits which are " necessary to the existence and well-being of every com- " munity. And, although a new remedy may be deemed "less convenient than the old one, and may in some de- " gree render the recovery of debts more tardy and diffi- " cult, yet it will not follow that the law is unconstitutional. "Whatever belongs to the remedy merely, may be altered " according to the will of the State, provided the altera- "tion does not impair the obligation of the contract. But " if that effect is produced, it is immaterial whether it is " done by acting on the remedy or directly on the con- " tract itself. In either case it is prohibited by the Con- " stitution. * * * * * It is difficult, per-

"haps, to draw a line that would be applicable in all cases "between legitimate alteration of the remedy and provis- "ions which, in form of remedy, impair the right. But "it is manifest, that the obligation of the contract, and "the rights of a party under it, may, in effect, be destroyed "by denying a remedy altogether, or may be seriously im- "paired by burdening the proceedings with new conditions "and restrictions, so as to make the remedy hardly worth "pursuing. And no one, we presume, would say that "there is any substantial difference between a retrospec- "tive law declaring a particular contract or class of con- "tracts to be abrogated and void, and one which took "away all remedy to enforce them, or encumbered it "with conditions that rendered it useless or impracticable "to pursue it. * * * * * * * *

"When this contract was made, no statute had been "passed by the State changing the rules of law or equity "in relation to a contract of this kind. None such, at "least, had been brought to the notice of the court; and "it must, therefore, be governed, and the rights of the "parties under it measured, by the rules above stated. "They were the laws of Illinois at the time, and therefore "entered into the contract and formed a part of it, with- "out any express stipulation to that effect in the deed. "Thus, for example, there is no covenant in the instru- "ment giving the mortgagor the right to redeem by pay- "ing the money after the day limited in the deed, and "before he was foreclosed by the decree of the court of "chancery. Yet no one doubts his remedy; for by the "laws of the State then in force, this right and this rem- "edy were a part of the law of the contract, without any "express agreement by the parties. So, also, the rights "of the mortgagee, as known to the laws, required no

"express stipulation to define or secure them. They "were annexed to the contract at the time it was made, "and formed a part of it, and any subsequent law impair- "ing the rights thus acquired, impairs the obligations "which the contract imposed."

This same doctrine is sustained by the Supreme Court of the United States in the cases of *Edwards* v. *Kearzey* and *Brine* v. *Insurance Company*, *supra*, and supported by numerous cases cited therein.

McCracken v. *Hayward*, *supra*, lays down the same rule as in the *Bronson* case, and was afterward followed by the Illinois Supreme Court in *Smoot* v. *Lafferty*, 1 Gilman, 383.

So in this case the law of Illinois, as it then stood, was a part of the law of the contract entered into by Gross when he purchased the note and trust deed.

The court, after having decided that, prior to the passage of the act of 1875, the mortgage company could not have made a loan and obtained a valid lien upon the real estate by mortgage, proceeds to discuss the effect of that act as applied to transactions which had occurred prior to its passage. The opinion holds that it was competent for the Legislature to validate the mortgage of the mortgage company, as between the parties thereto, and to make it a prior lien to the trust deed of Gross.

The error of the court consists in overlooking the rights and position of Gross. Assuming that the original contract of loan, and the mortgage executed by Lombard to the United States Mortgage Company could be validated by an act of the Legislature passed subsequent to the transaction, it does not follow that the rights of third persons which intervened could be affected by such legislation.

Gross having acquired a valid lien by the deed of trust at a time when the mortgage to the mortgage company was void, it follows that the trust deed became a *first* lien to the extent of his demand. If this lien became by operation of law a *first* lien the Legislature could not divest him of it, except in violation of the two provisions of the Constitution above quoted.

Under the ruling of the Illinois court, if the act of 1875 had never been passed, Gross could have enforced his security in the courts of that State as against the mortgage company.

The ruling of the Illinois court is to the effect that, without the aid of the act of 1875, the mortgage of defendant in error could not be enforced, there being a *want of power* to take such an instrument. That being true, Gross and the world had a right to buy and sell and mortgage the property, the same as if that instrument had never been executed, acknowledged or recorded, and they were not bound to anticipate any legislative curative act. On the other hand, in violation of the policy of the State and the corporation act of 1872, which was in force when defendant in error took its mortgage, which in terms forbid such contracts, any one dealing in this property might prudently have acted on the belief that no enabling or curative act would ever be passed in Illinois.

Judge COOLEY, in his work on Constitutional Limitations, after enumerating the cases in which it is competent for the Legislature to validate a contract, says :

"The operation of these cases, however, must be "carefully restricted to the parties to the original contract, "and to such others as have succeeded to their rights "with no greater equities. A subsequent *bona fide* pur- "chaser cannot be deprived of the property which he has

" acquired, by an act which retrospectively deprives his " grantor of the title which he had when the purchase was " made. Conceding that the invalid deed may be made " good, as between the parties, yet if, while it remained " invalid, and the grantor still retained the legal title to " the land, a third person has purchased and received a " conveyance, with no notice of any fact which should " preclude his acquiring an equitable as well as a legal " title thereby, it would not be in the power of the Legis- " lature to so confirm the original deed as to divest him " of the title he has acquired. The position of the case is " altogether changed by this purchase. The legal title is " no longer separated from equities, but in the hands of " the second purchaser is united with an equity as strong " as that which exists in favor of him who purchased first. " Under such circumstances, even the courts of equity " must recognize the rights of the second purchaser as " best, and as entitled to the usual protection which the " law accords to vested interests."

Cooley's Constitutional Limitations (*Fourth Edition*), *472*.

In *Thompson* v. *Morgan*, 6 Minn., 295, the court says: " The mortgage from Folsom to Morgan, dated October 23, " 1854, was ineffectual to pass an interest in the land, be- " cause executed in presence of one witness only—the stat- " ute requiring two witnesses. Morgan took nothing by " his mortgage. When Folsom conveyed the premises, in " 1856, to Babcock, he did so subject to the Morgan " mortgage, and so expressed in the deed. Babcock had " notice of the mortgage, but that did not change its " character nor cure its defects. He could safely take the " title subject to the mortgage, and rely upon the defense

" that was patent upon its face for protection. Thomp-
" son, claiming under Babcock, is affected by the recitals
" in the deed from Folsom to Babcock to the same extent
" as his grantor was, and no more. When Thompson
" took his mortgage from Babcock, he took with the same
" notice of the Morgan mortgage that was imputable to
" Babcock, to wit: that such a defective mortgage ex-
" isted, and he is in no way estopped from questioning
" it.

"The act of July 26, 1858, could not have the effect
" of curing the Morgan mortgage, to the prejudice of
" Thompson's or Babcock's rights; it was passed subse-
" quently to the date of the conveyances, by which they
" acquired interests in the land. The Legislature has the
" right, perhaps, to cure such irregularities in conveyances,
" as between the parties to them and all persons who take
" subsequent to the cure being wrought, but it cannot dis-
" turb vested rights."

This case is exactly like the one at bar, only not quite so strong; because in this case, the party was competent to take title, but an informality occurred in execution—*i. e.*, only one witness instead of two. In the case at bar *the party could not take title at all.*

In Alabama Life Insurance and Trust Company v. *Boykin*, 38 Ala., 510, the question was on the power of the Legislature to pass an act curing defects in acknowledgments of deeds of conveyance of land, and the court says:

"While we admit that the Legislature may change or
" modify the rules of evidence, and make those modified
" rules applicable to existing rights, and even to existing
" suits, we think this statute goes much further. It at-
" tempts to make valid and effective that which was before

" inoperative and void; effective to divest a title out of " one and vest it in another, and this by mere edict of " legislation.

"We think that to give this statute operation, as its " words import, would be to break down the dividing wall " between the legislative and judicial departments of the " Government. Moreover, we should invade that part of " our bill of rights which declares that the citizen shall not " 'be deprived of life, liberty or *property*, but by due " course of law.' A legislative edict which takes property " from one and gives it to another, is not 'due course of " law.'"

In *Dale* v. *Metcalf*, 9 Pa. State R., 109, the question was as to whether the Legislature had power to pass an act making previous sales under writs of *fieri facias*, which were informal, valid; and the court decided that, as to a subsequent purchaser under another incumbrance, such an act was void, and the second purchaser could not be divested of his rights, and held the act unconstitutional.

The case of *Orton* v. *Noonan*, 23 Wis., 103, involved title to real estate by a conveyance in which there was an improper description. An act passed in 1866 was designed to cover and cure erroneous descriptions, but the Supreme Court held such an act void. They say:

" The act of 1866, Chap. 53, Laws of 1866, has no in- " fluence upon this question, for the very plain reason " that the Legislature has no power to declare a deed " valid which, by law, was void as between the parties to " it at the time of the passage of the act."

In *Brinton* v. *Seevers*, 12 Iowa, 391, a deed was defectively acknowledged, so that the record gave no notice of the contents, and a subsequent act of the Legislature

declared that all such deeds should be held legal and valid in all courts of the State. The court say: "What effect, "then, is this legalizing act to have? Is it unconstitu- "tional, because it impairs the obligation of contracts; "because it interferes with vested rights, or because it "makes binding and operative, as to third persons, a "contract which the prior law had, as to them, declared "invalid?

"Our conclusion is, that the act is not repugnant to "the Constitution, upon the ground that it impairs the "obligation of contracts. It validates, rather than other- "wise, the contracts in question. *La Herlee* v. *Matthew- "son*, 2 Pet. 380; *Watson* v. *Mercer*, 8 Ib. 88. But it "is invalid upon the ground that, as applied to this case, "it interferes with vested rights. It appears from the "bill and exhibits that respondent purchased the prop- "erty, paid his money, and received the Sheriff's certifi- "cate before the passage of the curative act of 1858, but "procured the Sheriff's deed afterwards. If the purchase "had been subsequent to the taking effect of this act, "then he would be affected by its curative terms, and "could not in any sense claim that it interfered with "vested rights. By such voluntary purchase, with a "knowledge of the law, he would stand in no better "position than the parties to the deed. When he pur- "chases and parts with his money, however, before, the "Legislature can not, by afterwards declaring the title of "a third person valid, make it paramount, and deprive "such purchaser of all rights acquired under the Sheriff's "sale."

The Supreme Court of Illinois has held that the retrospective act of 1853, in regard to the acknowledg- ment of deeds by a married woman, cannot take from her

her property, because it deprives her of it without due process of law.

Russel v. *Rumsey*, 35 Ill. 362.
Rogers v. *Higgins*, 48 Ill. 211.

This is like the case where there are two deeds, the first of which is inoperative and the second good. In this case the first mortgage was invalid, because there was no grantee—the mortgage company not being able to take as grantee. The land was then conveyed by the mortgagor in that invalid instrument to the insurance company, which executed the note for $12,237, and a deed of trust to secure it. That was a valid note and deed. While in that condition, Gross became the owner of the note and security Thus he was vested with a right; thus he made a contract; and thus he acquired property. It was beyond the power of the Legislature to defeat his contract and security.

In *Moore* v. *Phillips* (7 M. and W. 536), one A. committed an act of bankruptcy. A creditor—one B.—then levied on A.'s property; assignees were then appointed; as the law then stood, the title of the assignees would relate back to the act of bankruptcy, and take precedence of the levy. Subsequently the statute of 2 and 3 Vict. c. 29, s. 2, enacted that there should be no relation back as against a *bona fide* execution creditor, not knowing of the act of bankruptcy. *Held*, that this statute could not be construed to extend to the case of assignees appointed before the act was passed.

Lord Abinger says: "The opinion of the court is, "that the statute is not retrospective so as to affect rights "vested before the passing of the act. As to the case of "*Luckin* v. *Simpson* (6 B. N. C. 353), we have consulted

" the judges of the Court of Common Pleas, and they " have stated to us * * * that the fact of " the appointment of assignees having been previous to " the passing of the act, either did not exist, or was not " represented to the court, and that if it had been, they " should have been of the same opinion as we are, that " the statute does not apply where it would operate to de- " feat rights antecedently vested in the assignee."

In a later English case (1848), *Moon* v. *Durden* (2 Ex. 22), the facts were as follows: A statute provided that " all contracts and agreements by way of gaming or " wagering shall be null and void, and that no suit shall " be brought *or maintained* in any court of law or equity " for recovering any sum of money or valuable thing al- " leged to be won upon any wager," etc. The court held that this statute could not be held to apply to suits on wagers, begun before the statute, and that eminent judge, Baron Parke, was clearly of opinion that the statute also did not, in spite of its language, apply to contracts made before its passage, whether action on them had been begun or not. He says:

" It seems a strange thing to hold that the Legislature " could have meant that a party who under a contract " made prior to the act, had as perfect a title to recover " a sum of money as he had to any of his personal prop- " erty, should be totally deprived of it without compen- " sation. It is a still stranger thing to hold that if he has " already commenced an action with an undoubted right " to recover his debt and costs, he should not only forfeit " both, but also be liable, as he would in the ordinary " course of a suit, to pay the cost of his adversary by be- " ing obliged to discontinue. * * * These considera- " tions afford a strong reason for limiting the operation of

" the words of this section, and holding that they apply " to future contracts, and actions on such future contracts " only; at all events to future actions only, if any distinc- " tion can be made in the degrees of apparent injustice."

Baron ROLFE said:

" The general rule on this subject is stated by Lord " COKE in the Second Institute, 292, in his commentary on " the statute of Gloucester, '*Nova constitutio futuris for-* " *mam debet imponere, non præteritis*,' and the principle is " one of such obvious convenience and justice that it must " always be adhered to in the construction of statutes, " unless, in cases where there is something on the face of " the enactment putting it beyond doubt that the Legisla- " ture meant it to operate retrospectively. * * * I " do not mean, of course, to say that an enactment may " not be so made as to have a retrospective operation. In " some cases the Legislature has thought it just to make en- " actments retrospective, even at some sacrifice of general " principle. But then it does so in express terms, and " generally, I believe invariably, couples the retrospective " enactment with the best indemnity in favor of vested " rights which the nature of the case admits."

This decision is strong, for certainly a vested right in a gambling debt might be thought rather unworthy of protection; and certainly it is less worthy of protection than the claim of Gross, who bought the note and trust deed in good faith.

In *Gardner* v. *Lucas*, L. R. 3 App. Cas., 582 (1878), an invalid lease had been granted; a subsequent statute which validated certain instruments, and which seemed to apply to this case, was passed. It was held by the House of Lords that it could not be applied to this lease. The language of the court in this case is most strong; and one

of the chief reasons why they held the statute prospective was because of the injury to third persons. Lord CAIRNS said :

" The theory must be that the whole of the subjects " of Scotland, upon whose property the shadow of an in- " strument which had failed in its formalities had fallen be- " fore the act was passed, would be subject to having that " instrument springing into validity and operating upon " their property or upon their persons. * * * " The thing might have passed out of their recollection, it " might have been treated, years before the act of 1874 " had passed, as a document which went *pro non scripta*, " and yet they might find that under the ambiguous words " of this 39th section, the instrument came again into " validity. The proposition only requires to be stated in " that way to show that this is a construction which your " Lordships would not arrive at, unless compelled by the " strongest and clearest words of the statute."

Lord O'HAGAN said :

" Up to the year 1874, when the act in question was " passed, there was absolutely no validity in the deed. " Can we suppose that in that year, no right existing, as " the conditions of a valid execution had not been fulfilled, " the Legislature intervened, and by equivocal words " without any expression of clear intention, in direct " opposition, apparently, to public policy and private " interest, established a right that never before had any " existence? I shall not occupy your Lordships' time by " saying again what has been already said of the evils " resulting from such an interpretation, and the unreason- " able consequences attaching to it. *A man who, on the* " *faith of the construction*," (that is, that such former leases were invalid)—" *which, as I think, must now be taken*

" *to be correct, had advanced a large sum of money in a pur-*
" *chase, would, if the view of the appellants were adopted,*
" *be deprived of all his outlay. An heir or next of kin,*
" *who, for a number of years, had possessed property in the*
" *assurance that the law of the land had given it to him,*
" *and would protect him in it, might find himself all at*
" *once deprived of that property by an ex post facto decision,*
" *and his family beggared by a construction of which no-*
" *body, perhaps, had ever thought before. These are con-*
" *sequences of a very serious kind;* and although Mr. Ben-
" jamin said that in a matter of this sort, there are no
" vested interests which your Lordships should regard, I
" cannot concur with him. *The vested interests are those*
" *of a man who, acting upon the law as he understands it,*
" *and as it really turns out to be, has advanced his money*
" *or changed his position; and it cannot be said in these*
" *circumstances, that such interests do not deserve pro-*
" *tection.*"

The Supreme Court of Illinois, in their opinion, seem to have made this case turn upon the elementary principles laid down on pages 378 and 379 (2d ed.) of Judge COOLEY'S work on Constitutional Limitations, the text of which is as follows:

" The operation of these cases, however, must be
" carefully restricted to the parties to the original con-
" tract, and to such other persons as may succeed to their
" rights with no greater equities. A subsequent *bona-fide*
" purchaser cannot be deprived of the property which he
" has acquired, by an act which retrospectively deprives
" his grantor of the title which he had when the purchase
" was made.

" Conceding that the invalid deed may be made
" good, as between the parties, yet if, while it remained

" invalid, and the grantor still retained the legal title to " the land, a third person has purchased and received a " conveyance, with no notice of any fact which should " preclude his acquiring an equitable as well as a legal " title thereby, it would not be in the power of the Legis- " lature to so confirm the original deed as to divest him of " the title he has acquired. The position of the case is " altogether changed by this purchase. The legal title is " no longer separated from equities, but in the hands of " the second purchaser is united with an equity as strong " as that which exists in favor of him who purchased first. " Under such circumstances, even the courts of equity " must recognize the right of the second purchaser as best, " and as entitled to the usual protection which the law " accords to vested rights." (*Record, p. 22.*)

Applying the doctrine contained in this extract to the facts in this case I can only construe it as in favor of the superiority of the lien of Gross over that of the mortgage company.

It is settled that the mortgage from Lombard to defendant in error was invalid.

It is settled that while this mortgage remained invalid, Lombard, still retaining the legal title, conveyed the premises to the National Life Insurance Company, which assumed, certainly, to pay the mortgage debt, but that assumption could have no greater force or effect, if as much, as the agreement of Lombard to pay.

It is settled that the insurance company conveyed the legal title by trust deed to secure the note purchased by Gross, who acquired an equitable interest in the trust deed to the extent of his note, from which I can only arrive at the conclusions that all the conditions of the text were fulfilled, in which it would not be in the power of the

Legislature to so confirm the original mortgage as to divest Gross of the title he had acquired.

No significance can attach to the word "notice" found in the text, because—

First—Gross had no actual notice of the mortgage to defendant in error, and under the recording laws of Illinois, the placing on record of an invalid deed is not notice; and

Second—Judge COOLEY'S text is founded on decisions of courts, which he cites, in every one of which it appears the persons claiming adversely to the invalid deeds or transactions had express knowledge of them. I have already quoted from two of the cases cited by Judge COOLEY, to wit:

Brinton v. *Severs*, 12 Iowa, 389.
Thompson v. *Morgan*, 6 Minn. 292.

Another case cited by Judge COOLEY, is *Southard* v. *Central R. R.*, 2 Dutcher, 3, in which case Southard made a will devising a contingent interest to one Mary S. After his death a statute was passed making contingent interests devisable, which was in terms retroactive.

The court held the statute void as against the heirs who had became vested with the estate of deceased before the passage of the statute.

So far is this case from being an authority in favor of the supposed doctrine of Judge COOLEY, that it is probably an authority against it. Here the heirs, in all probability, knew of the will, and even if they did not, they were not, *stricto sensu*, purchasers without notice, for they paid no value of course. Nor in this case is there a word said as to the ground on which the validity of such statutes is to

be questioned; for here, as in the Iowa case, no matter what criterion was adopted, the statute was unconstitutional.

The next case cited by Judge COOLEY is *Meighen* v. *Strong*, 6 Minn. 177, the facts of which were as follows:

The statute of that State required all conveyances of land to be executed in the presence of two witnesses, who should sign the same as such. In this state of the law, one Hayles made a conveyance of land to Brackett, which was signed by only one witness. Afterward, the defendants, with full knowledge of this invalid deed, as the jury found, purchased the land from Hayles, and subsequently the Legislature passed an act declaring all deeds previously executed in the presence of one witness to be legal and valid. The question to be decided was, whether this curative act, which was clearly retroactive in its terms, could have the effect of making the invalid deed good as against the defendants, who purchased with notice of its existence. The Supreme Court decided this question in the negative, employing this language:

"Every conveyance of lands must be in writing under "seal, signed by the grantor, and executed in the pres- "ence of two witnesses, who shall sign the same as such. "Each of these requirements is essential to the validity of "the conveyance, and one cannot be dispensed with more "than another. Had the conveyance to Brackett been "by parol, or without seal or signature, it would have been "regarded as an attempt only to convey lands, and no one, "even with a full knowledge of such attempt would, on "that account, have hesitated to purchase from Hayles; "and yet, by statute, it is no more essential that the con- "veyance should be in writing, or signed and sealed by the

" grantor, than that it should be executed in the presence " of, and attested by, two witnesses.

" In this view of the law, it will be apparent that it is " wholly immaterial whether defendants knew of the at- " tempted conveyance by Hayles to Brackett at the time " they purchased the premises. At the time of the con- " veyance by Hayles to Meighen (one of the defendants), " Hayles had not conveyed away his title, and unless there " were facts bearing on the transaction other than the " mere void conveyance to Brackett, Meighen had a right " to disregard Brackett's deed, and take a conveyance to " himself, just as he might have done had Hayles attempted " to convey the land to Brackett by parol, or by an in- " strument without signature or seal.

" The act of July 26, 1850, declaring all conveyances " executed in the presence of one witness to be legal and " valid, does not, in our opinion, aid the plaintiff. The " rights of the defendants had accrued to him before " the act was passed. When there has been an actual " conveyance of lands, but the conveyance has been de- " fectively executed, the Legislature may cure the defect, " so far, at least, as to bind the parties thereto; or, if the "defect relates to the evidence by which such conveyance " is to be established, the rule of evidence may be so " changed as to enable it to be shown by evidence which, " without such change, would have been adjudged in- " sufficient; and this would be binding, not only upon the " parties, but upon all who subsequently acquire title with " knowledge of the former conveyance. In that case, the " statute would operate not upon the conveyance itself, " but upon the evidence by which it is to be estab- " lished, and could not be said to affect the title, for that " had already passed, though the evidence of it was in-

" sufficient. But when, as in this State, the statute pre-
" scribes the manner in which only a conveyance of real
" property by deed can be made, any attempt to convey
" without complying with the requisites of the statute
" must be regarded as a mere nullity ; and the Legislature
" could not give it validity, so as to affect persons who
" may have subsequently acquired title to the property,
" without divesting them of rights which they had legally
" acquired."

The case next cited by Judge COOLEY, of *Norman* v. *Heist* (5 W. & S., 171), was where a statute enabling bastards to inherit was passed after the death of an intestate putative father : it was held that it could not divest the title of the legitimate children in favor of the bastard; but not a word is said about notice in the case, and it is clear that the decision was correct on any principle that may be adopted.

In *Greenough* v. *Greenough*, 11 Penn. State, 494, cited by Judge COOLEY, the validity of a will was in question; when the testator died, the law was, that a testator's mark to his name at the foot of a testamentary paper, without proof that the name was written by his express direction, was insufficient to make the paper a will. After the testator's death, the Legislature passed a law declaring that every will theretofore made, to which the testator had made his mark or cross, should be deemed valid.

The Supreme Court held this act, so far as it was retroactive, to be utterly void. It said :

" It (the act) is destitute of retroactive force, not
" only because it was an act of judicial power, but because
" it contravenes the declaration in the ninth section of the
" ninth article of the Constitution, that no person shall be
" deprived of life, liberty or property, except by the judg-

" ment of his peers or the laws of the land."

Now this case is on its facts an authority against the supposed doctrine of Judge COOLEY. For the children probably knew of the defective will. But whether it is contrary to COOLEY'S view or not, not one word is said in the case as to notice being the criterion of the validity of retrospective statutes.

In the next case cited by Judge COOLEY,

Les Bois v. *Brummell*, 4 Howard, 449,

also, not a word is said about notice as the criterion for the validity of retrospective laws. It was held that a confirmatory act, passed by Congress in 1836, relative to some invalid grants of public land, could not divest the intermediately acquired titles of some third persons; nothing appears as to whether the third persons knew of the prior invalid grants or not.

The case of *McCarthy* v. *Hoffman*, 23 Pa., 508, merely affirms *Greenough* v. *Greenough*, 11 Pa. State, 494, and says nothing as to notice.

Another case cited by Judge COOLEY, *Sherwood* v. *Fleming*, 25 Tex., 408, was where a void patent was issued on certain land. Subsequently A got a located certificate on the land. Later still, a statute was passed, making the patent valid. *Held*, that it could not divest A's title. This was put on the broad ground that the statute disturbed vested rights, but not a word was said whereby it could be inferred that if A had had notice of the invalid patent, the subsequent statute would have been good as against him.

This is true of all the cases above cited. The decision in every one of them is put on the broad ground that the several statutes disturbed vested rights, and there is no intimation in any of them that if the second purchaser

had had notice of the prior claim, the statute would have affected him.

The same may be said of the last case cited by Judge COOLEY: it is

Wright v. *Hawkins*, 28 Texas, 452.

The case is put broadly on the ground of disturbing vested rights, and is indistinguishable in its facts from the case of

Sherwood v. *Fleming*.

I now call attention to a case not cited by Judge COOLEY:

Bolton v. *Johns*, 5 Barr. 145.

Here a statute was passed making valid prior invalid mechanics' liens; subsequently to the acquiring of the so-called lien and prior to the curative statute, A bought the land; A did not prove he paid value for the land. It was held that the case must go to the jury on the question whether A paid value, and that if he did, the statute was unconstitutional as to him, *even if he had express notice of the prior lien when he bought*.

The court say:

"So far as regards the parties to the contract to build, "the enactment of the statute in question was clearly con- "stitutional. No alteration of their rights was proposed, "further than to give a specified remedy against the prop- "erty, in addition to the remedy that the contractor had "against it indirectly by action, and retrospective laws have "always been sustained where they touched not the right, "but the remedy. So far there is no dispute. But the "scene may be changed by the introduction of a purchaser "for value actually paid at a time when the property was "free from the supposed lien, *and it is proper to state that*

" *his having had notice of a defective lien would be imma-*
" *terial.* In *Simm* v. *Brown*, 3 Yeates, 186, followed in
" *Heister* v. *Fortner*, 2 Binney, 40, it was held that the
" defective registry of a deed is a nullity, *and in the case*
" *before us, the lien filed was a nullity which the purchaser*
" *was not bound to notice. Even had actual notice of it*
" *been given him, he would have been informed of nothing*
" *but an abortive attempt to create a lien where none could*
" *exist, and if he paid for a title actually unincumbered at*
" *the time, a statute to create an incumbrance on it after-*
" *wards would be a statute to take so much out of his pocket*
" *and give it to another destitute of claim to it, either legal*
" *or moral.*"

In the case of *Ballard* v. *Ward*, 89 Pa. State, 358, a man adopted, by deed, a niece as his daughter. His children knew of it. There was evidence that the niece lived in the family as a daughter; the deed was not according to the statute. The man died. A statute then took effect enacting that such invalid adoption should be valid. It was held that this could not affect the heirs of the intestate; and that they could exclude the adopted child from all share in the property. SHARSWOOD, J. says:

" This act was plainly intended to be retrospective,
" and whatever might have been its operation in giving
" effect to the instrument of August 11th, 1863, * * it
" is too plain for argument, that a proceeding under it
" could not divest the estate of the defendants in error,
" which had vested by the death of their father."

The father of the children was a party to the agreement of adoption — which strengthens the case.

3.

The Supreme Court of Illinois, in its opinion, found on page 20, etc., of record, says :

" The general incorporation law of 1872, which was " in force when the mortgage was executed, provided for " the formation, in the State, of companies for any lawful " purpose, expressly excepting, however, corporations for " banking, insurance, real estate, brokerage, operation of " railroads, *and the business of loaning money*. ' Section " 26 of the act provided that 'foreign corporations, and the " officers and agents thereof, doing business in this State, " shall be subject to all the liabilities, restrictions, and " duties that are or may be imposed on corporations " of like character organized under the general laws of this " State, and shall have no other or greater powers.' "

" But we see from the first sentence of this section 26, it was the policy of the State that foreign corporations should have no other or greater powers in the " State than corporations of like character organized " under the general laws of the State ; and further see, " from the first section of the act, it was a part of the " same policy that corporations shall not be formed in the " State for the business of loaning money.

" It follows that" (prior to the act of 1875) " corporations organized in a foreign State, for such business of " loaning money, could not claim to pursue such business " in this State. The comity between the States does not " demand we should hold this mortgage company, incorporated under an act of the State of New York, could " lawfully, within this State, exercise powers denied to " corporations formed within our own borders. All the " acts of this company here in furtherance of such busi-

" ness of loaning money were invalid, as obnoxious to " our policy and institutions.

" The act of April 9, 1875, provides, among other " things, that any corporation formed under the laws of " any other State or country, and authorized by its char- " ter to invest or loan money, may invest or loan money " in this State. Any such corporation that may have in- " vested or lent money, as aforesaid, may have the same " rights and powers for the recovery thereof, subject to " the same penalties for usury, as private persons, citi- " zens of this State; and when a sale is made under any " judgment, decree, or power in a mortgage, or deed, " such corporation may purchase, in its corporate name, " the property offered for sale, and become vested with " the title, whenever a natural person might do so in like " cases. (Laws 1875, page 65).

" It was the evident intention of this latter act not " only to change somewhat the policy of the State, but to " validate such contracts as that here under considera- " tion."

Opinion in *Record, p. 21.*

Applying the rule here laid down to the facts in the case at bar, it is clear that the contract of mortgage between Lombard and defendant in error, which was made in 1872, was absolutely void; and, without the aid of the act of 1875, defendant in error could not have enforced its mortgage, as against Lombard or any one else, or as against the land, any more than if it had advanced the money to Lombard for an unlawful purpose.

No court could have enforced the mortgage of defendant in error before the act of 1875, without willfully violating the statutory law of the State, as well as the pol-

icy of the institutions of the State, as declared by its Legislature.

Now, *before* the act of 1875 was passed, Lombard sold and conveyed the premises to the National Life Insurance Company, and it, to secure a part of the purchase money, executed its note and a trust deed on the premises, and Gross purchased this note and trust deed for a valuable consideration before maturity and without notice.

When Gross made this purchase, the policy of the law of Illinois, under which defendant in error was absolutely prohibited from loaning money in that State and taking real estate security thereon, was unchanged; and Gross, at the time he purchased this note and trust deed, took in equity a lien on the mortgaged property superior to all others. At this time the mortgage of defendant in error was still void, as being prohibited by law.

The Illinois Supreme Court, in its opinion, holds that Gross stands in the attitude, "so far as concerns the "equitable security, of an assignee of an equitable title, "subject to all the equities and infirmities existing against "it in the hands of the original parties to the contract."

The first case in the Supreme Court of Illinois, in which this rule was announced, is *Olds* v. *Cummings*, 31 Ill. 192, in which case the reason of the rule is stated as follows: "When one takes an obligation secured by a "mortgage, relying upon the mortgage as the security, he "must do it deliberately, and take time to inquire if any "reason exists why it should not be enforced."

Suppose Gross had made full inquiry, what would have been the result? He would have learned that the United States Mortgage Company was a foreign corporation, organized for the purpose of loaning money on real estate security; that its loan to Lombard, on a real estate

mortgage, was in violation of the express statute of Illinois, and of its policy, as declared from the origin of the State government, to the day he purchased the note and trust deed.

Was he bound to consider whether the Legislature or the Supreme Court would at some future time reverse the policy of our institutions, and legalize a void instrument? Unless he was bound to do this, then, under the rule announced in *Olds* v. *Cummings*, he had a right to take the security which he purchased, subject *only* to the infirmities attaching at the time he purchased.

In other words, the law, as applied to the facts as they existed when Gross purchased, fixed his *status* in regard to the security purchased. *The equitable rule invoked goes this length, and no further.*

I have thus far argued the case upon the ruling of the Illinois court, as to the character of Gross' title to the property on which his note was secured.

But the rule governing assignees of notes secured by trust deeds on real estate, as laid down by the Illinois court in *Olds* v. *Cummings*, and other cases, is not the rule of law laid down by the Supreme Court of the United States on the same question; and in *Carpenter* v. *Longan*, 16 Wall. 271, and *Kennicott* v. *Supervisors*, 16 Wall. 452; *New Orleans* v. *Montgomery*, 95 U. S. 18; *Sawyer* v. *Prickett*, 19 Wall. 166, and other cases, this court decides the opposite to be the rule, and holds that an assignee of a promissory note, before maturity, secured by a trust deed, takes it relieved of any equities existing between the original mortgagor and third persons. Therefore, if there had been equities existing between Lombard and the mortgage company, or the insurance company and the mortgage company, Gross, as the assignee

of the note and trust deed, could not be affected by them. So I contend, that, independent of the decisions in Illinois, the instrument of the mortgage company from Lombard being void at law and in equity, even if there were equities between Lombard and the mortgage company, Gross acquired rights superior to such equities. But there were no such equities. The mortgage company took its mortgage in violation of the law of Illinois, and it could not assert an equitable right and enforce its mortgage. If this was not so, the law as to it would have been inoperative, a proposition not to be entertained at all.

The decision of the Illinois court being based on a legislative enactment, this court has jurisdiction to inquire whether such legislation does not impair the obligations of the contract of Gross, and thereby violate the Federal Constitution.

So this court in *Delmas* v. *Insurance Company*, 14 Wallace, 668, says: "Besides, this court has always jeal-" ously asserted the right, when the question before it " was the impairing of the obligations of a contract by " State legislation, to ascertain for itself whether there " was a contract to be impaired. If it were not so, the " constitutional provision could always be invaded by the " State courts giving such construction to the contract, or " such decisions concerning its validity, as to render the " power of this court of no avail in upholding it against " unconstitutional State legislation." And the court cites authorities in support of its position.

Consult, also:

University v. *The People*, 9 Otto, 309–321.
Jefferson Bank v. *Skelly*, 1 Black. 436.
Bridge Proprietors v. *Hoboken*, 1 Wall. 144.

4.

While the mortgage to defendant in error was subject to the infirmity of illegality, the act of condemnation of thirty-five feet off the west end of the lots by the city had taken place, and the sum of $\$10{,}952\frac{73}{100}$ was adjudged against the city for the land so taken, which, under the waiver or exemption clause in the mortgage, became absolutely vested in the grantor, Lombard, and to his assigns, independent of the legal character of the mortgage. This judgment, through the conveyance of the thirty-five feet by Lombard to the insurance company, and by it to the trustee of Gross, became the property of Gross. The act of 1875 did not purport to cover this collateral agreement between Lombard and defendant in error, but the Supreme Court has, by its decision, extended the terms of such act so as to also deprive Gross of this fund, arising from the taking of so much of the lots as were not occupied by the building erected by the money advanced by defendant in error, and which was expressly reserved in the mortgage to the grantor upon the contingencies which were wholly consummated before defendant in error had any rights to any part of the land in controversy which it could assert.

This fund was not adjudged to the mortgage company by the Supreme Court of Illinois on the theory that these damages could be set off against the benefits assessed upon that part of the land on which the building was erected, because that could not be done under the laws of Illinois, but it was taken from Gross and given to the defendant in error because Lombard had not paid the ss es sment for benefits.

I refrain from arguing to this court the law of Illinois relating to the condemnation of property for streets, awarding damages therefor, and assessing benefits arising from such streets to the adjacent property especially enhanced in value by the improvement, because it would not be within the jurisdiction of this court to entertain such questions, as not coming within the act of Congress allowing the removal of causes from the highest courts of the States to this court; but I simply invoke the protection of this court in the premises, so far as the rights of plaintiff in error have been impaired under the Constitution of the United States.

THOMAS S. McCLELLAND,

Of Counsel for Plaintiff in Error.

108-477

IN THE

Supreme Court of the United States,

October Term, A. D. 1882.

J. GROSS,
Plaintiff in Error,
v.
THE UNITED STATES MORTGAGE COMPANY,
Defendant in Error.

Error to the Supreme Court of Illinois.

Brief and Argument for Defendant in Error.

WIRT DEXTER,
Counsel for Defendant in Error.

PRESS OF BEACH, BARNARD & CO., 104 RANDOLPH ST., CHICAGO.

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CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.
1883.

Statement of Facts.

This is a suit affecting the title to two lots of land in the city of Chicago.

On August 22, 1872, Benjamin Lombard, then the owner, executed and delivered to defendant in error, a corporation organized under the laws of New York, a mortgage, conveying the premises, to secure a building loan of $50,000. This mortgage contained the usual covenants and powers and was duly recorded on the day of its date. With the proceeds of the loan Lombard erected a building on the land.

This mortgage contained the following provision:

"It is understood and agreed that this mortgage is to "be subject to the right of the city to take so much of said "lots as shall be necessary for the opening and extension "of Dearborn street, being 36 feet, more or less, off the "west end of said premises; in which event any benefit "which may accrue to the said party of the first part "(Lombard) herein, may be paid by the city to said party "of the first part direct."

On December 10, 1872, Lombard conveyed the premises to the National Life Insurance Company, of Chicago, in consideration of $100,173, and as part of the consideration the purchaser assumed the payment of the mortgage debt to the defendant in error. On the same day the insurance company executed its note for $12,273, for part of the purchase money, and to secure this note executed a trust deed of the premises. This note and trust deed were

delivered to Lombard, who negotiated them, and after passing through different hands, were purchased by Gross, the plaintiff in error, but whether before or after maturity does not appear.

On March 17, 1873, the city of Chicago passed an ordinance for the opening and extension of Dearborn street. Under this ordinance proceedings were instituted for the condemnation of that part of the land referred to in the clause in the mortgage to defendant in error quoted above. On April 23, 1874, a judgment of condemnation was entered awarding as compensation $10,972.73. Proceedings were also instituted against the property for an assessment against it for benefits arising from the proposed extension, resulting in an assessment of $15,897.84 against the property.

Lombard became insolvent, and failed to pay the taxes or assessments, including the assessment for opening Dearborn street, or interest on the mortgage after October 1, 1873. The National Life Insurance Company also became insolvent, and on June 1, 1874, was adjudged a bankrupt, and Kirk Hawes was appointed its assignee.

In addition to the mortgage to defendant in error, and the trust deed held by plaintiff in error, the property was subject to claims for mechanic's liens, and for the purpose of adjusting the respective rights of the parties, and to fix, by decree of court, the priority of liens, and obtain a sale of the property for their payment, the assignee filed his bill in chancery in the Superior court of Cook county, making Gross, the United States Mortgage Company and others, defendants.

Gross filed a cross-bill against the Mortgage Company and others, claiming a first lien on the land on the ground that the mortgage company was a foreign corporation,

incapable of taking title to real estate in Illinois as security, or otherwise, and that the mortgage from Lombard was therefore absolutely void. Gross also claimed in his cross-bill that by the clause in its mortgage, the Mortgage Company had waived any claim to the $10,972.73 damages awarded for the opening of Dearborn street, and that although the assessment for benefits exceeded the amount awarded for damages, he was entitled to have the damages paid to him.

The Superior court decreed that the mortgage was valid, and was a lien prior to the trust deed held by Gross, but that under the clause in the mortgage, Gross was entitled to the $10,972.73, damages.

At the date of the decree there was due on the note held by Gross, $16,159.45, and to the United States Mortgage Company the sum of $64,968.

From this decree the mortgage company prayed an appeal to the Supreme Court of Illinois, and cross errors were assigned by Gross.

The case was submitted to that court on an agreed statement of facts, and the court affirmed the validity of the mortgage, but reversed so much of the decree as awarded the $10,972.73 to Gross, holding that, under the facts, the clause in the mortgage did not operate as a waiver of the mortgagee's claim to the damages.

Mr. Justice BAKER delivered the opinion of the court. (*United States Mortgage Co.* v. *Gross*, 93 Ill., 483.)

It is claimed by defendant in error that the only question affecting the validity of the mortgage presented by the record, was, whether a foreign corporation could take title to real estate in Illinois to secure an indebtedness. On this question the Supreme court held in favor of the mortgage company.

But the opinion went further, and assuming that it appeared in the record that the mortgage company was organized for the business of loaning money, and that the mortgage in question was taken in the course of such business, announced the proposition that foreign corporations organized for the business of loaning money, were prohibited by the policy of the state as expressed in the incorporation law of 1872, from pursuing such business in the state, and that therefore the mortgage was originally void. The court held, however, that an act of the legislature of Illinois, in force July 1, 1875, entitled "An act to enable "corporations of other states and countries to loan money "in Illinois, to enforce their securities and acquire title to "real estate as security," valididated the mortgage.

Gross has brought the case by writ of error to this court, on the ground that there is drawn in question the validity of the statute of 1875, as being repugnant to the constitution of the United States, and that the decision of the state court was in favor of its validity.

The question as to the right to the damages awarded for opening the street, turns upon the construction of the clause in the mortgage to defendant in error. (See opinion, Rec., 24), and it is conceded by counsel for plaintiff in error that the decision of the state court on that question is not before this court for review. (Argument, 45.)

The question as to the validity of the mortgage to defendant in error is the sole question in the case.

Brief and Argument.

I.

THIS COURT HAS NO JURISDICTION IN THIS CASE.

In *Dugger* v. *Bocock*, 14 Otto, 603, this court say:

"The rule in relation to our jurisdiction is, that it must "either appear from the record in express terms that there "has been a decision against the right claimed under the "constitution, laws or treaties of the United States, or that "the judgment or decree complained of could not have "been given without so deciding."

The only question in this case was whether a mortgage executed to a foreign corporation upon certain property in Illinois was valid.

Its validity was attacked in the court below upon the sole ground that, under the laws of Illinois, the corporation had no capacity to take the mortgage. There are no averments in the bill or agreed state of facts which raise any question under the constitution, laws or treaties of the United States.

The question was purely a domestic one, involving the public policy of the State, and was decided in the court below adversely to plaintiff in error. The mortgage was given for actual money, and was presumably valid, and there had been, at the time when this controversy arose, no decision in Illinois against the validity of such mortgages.

The decision complained of could be reached by determining this single question: What was the policy of

the State as to foreign corporations taking mortgage on property in Illinois?

The only pretense of a federal question is that the court below placed its decision upon the State statute of 1875, validating past mortgage loans, and without which statute, according to the reasoning of the court, the mortgage would have been void, for the reason that the general incorporation law of Illinois, passed in 1872, and which was in force when the mortgage in controversy was executed, provided for the formation of corporations, expressly excepting those formed for the business "of loaning money"—thus indicating the policy of the state against the formation of corporations for the business "of loaning money," and consequently against the recognition of foreign corporations organized for the same purpose, and thus the statute of 1875, it is claimed, worked an impairment of the rights plaintiff would have taken had it not been passed.

Without the decision of the Illinois court complained of, the mortgage was upon its face regular, and presumably valid, and the decision brought here holds it to be so. This decision could have been reached without passing upon the statute of1875;

1. Upon the ground that the public policy of the State of Illinois, authorized transactions of the nature under discussion.

2. That the mortgage to a foreign corporation that was not organized solely for the purpose of "loaning money" was valid. The validating statute of 1875 cannot be drawn into the case save upon the theory that this corporation was organized solely for the purpore "of loaning money," and therefore, as a foreign corporation was attempting to exercise powers forbidden by home

corporations. The bill alleges no such fact, but simply that the mortgage was executed to a foreign corporation, organized under the law of the State of New York, and having its place of business there, and having no legal existence in this State (Illinois), and could not take the title by mortgage or otherwise, or acquire any interest therein, or valid title thereto. In the agreed statement of facts the allegation on that subject is as follows:

5. "It is further agreed that said United States Mort-"gage Company is, and was at the time said mortgage "to it was executed, a corporation organized under and "by virtue of the laws of the State of New York, and still "is a foreign corporation, having its principal office and "place of business in New York city." (Rec., 13.)

The decision complained of holds that a mortgage executed to a corporation such as above described is valid. The fact that the court below chose to discuss the effect of the statute of 1875 is of no importance.

In *Bank* v. *The Board of Liquidation*, 8 Otto, 142, this court say: "We have often decided that it is not "enough, in regard to this court's jurisdiction on a judg-"ment of the state courts, for the record to show that the "federal question *was argued* or presented to the court "for decision. It must appear that this decision was nec-"essary to the determination of the case, and that it actu-"ally was decided, or that the judgment, as rendered, "could have not been given without deciding it."

II.

THE SOLE QUESTION AS TO THE ORIGINAL VALIDITY OF THE MORTGAGE, PRESENTED BY THE RECORD, IS THE GENERAL QUESTION WHETHER A FOREIGN CORPORATION COULD TAKE TITLE TO REAL ESTATE IN ILLINOIS BY MORTGAGE TO SECURE A LOAN OF MONEY.

It will be seen, on an inspection of the record, that this case was submitted to the Supreme court of the state, on an agreed statement of facts. (Rec., 7-15.)

This statement sets forth:

1. That Gross, being the holder of the subsequent mortgage, filed a cross-bill in the case, for the purpose of having the mortgage to the mortgage company "declared "null and void, *on the ground* that said United States "Mortgage Company is, and was at the time said mort- "gage was executed, *a foreign corporation, organized* "*under and by virtue of the laws of the State of New* "*York, and having its principal place of business in the* "*city of New York, and having no legal existence in this* "*state*, could not, under the laws of the State of Illinois, "where said mortgage was executed, and where said "property lies, *take the title* to real estate situated in the "State of Illinois, either by way of mortgage or other- "wise, nor acquire any interest therein or any valid title "thereto." (Rec., 7, 8; fols. 18, 19.)

2. That the mortgage company filed its answer to this cross-bill, alleging that Lombard executed to it the mortgage, dated August 22, 1872, to secure a loan of fifty thousand dollars, gold coin of the United States, with interest, etc., and running five years, on the property in controversy. (Rec., 8; fol. 19.)

3. That, "in order to present *certain questions at issue* "in such cause to the Supreme court of the state, and to "avoid the necessity of taking up a full record, the fol- "lowing facts are agreed upon." (Rec., 8; fol. 21.)

(1.) That Lombard, being the owner of the property in question, "for the purpose of securing the necessary "funds to erect a building on said property, negotiated a "loan of fifty thousand dollars in gold coin from the "United States Mortgage Company, and, for the purpose "of securing the payment of the same," with interest, executed his mortgage deed on the premises; and that the mortgage company, at various times, from August 22, 1872, to February 24, 1873, paid to Lombard, on account of said loan, the aggregate sum of forty-seven thousand dollars, in gold. (Rec., 9; fols. 21, 22.)

(2.) "That said United States Mortgage Company is "and was at the time said mortgage was executed, a "corporation *organized under and by virtue of the laws of* "*the State of New York*, and still is a *foreign corporation*, "*having its principal office and place of business in city of* "*New York*." (Rec., 13, folio 31.)

(3.) That "the question in dispute between said Gross "and the United States Mortgage Company is whether "the said Mortgage Company took or acquired any valid "right, title or interest in or to said premises, or any part "thereof, under and by virtue of said mortgage, or had or "has any valid lien thereon as against him, said Gross." (Rec., 13, folio 31.)

It will be perceived that this statement was only intended to present, and does only present, the general question whether a foreign corporation could take title to real estate in the State of Illinois, by mortgage, to secure a loan of money.

This question was made on the authority of *Carroll* v. *The City of East St. Louis*, 67 Ill., 568, and the last clause of section 26 of the general incorporation law of 1872, providing that no foreign or domestic corporation "shall purchase or hold real estate in this state except as "provided for in this act."

On this question the Supreme court of Illinois decided in favor of the original validity of the mortgage, holding that *Carroll* v. *The City of East St. Louis*, and the provision of the statute quoted, were aimed at perpetuities, which mortgages to secure indebtedness had no tendency to create.

Referring to the provision of the statute, the court say:

"The latter sentence of section 26 was aimed at the "purchase and holding of real estate by corporations, for "the reason that such acts would tend to create perpetui- "ties; and by this and other provisions of the same act the "evil feared was effectually guarded against. We think, "however, it was not designed thereby to prevent corpora- "tions from taking mortgages on real estate as security "for debts. Indeed, it is difficult to see how mortgages, "which are conveyances subject to conditions of defea- "sance, can be considered as tending to create perpetui- "ties. Payments made on the debts thus secured, defeat "the titles of the mortgagees, and even if they take pos- "session, the incomes gradually undermine and destroy "their titles. If the premises are sold under powers, the "mortgagees cannot themselves become purchasers, and "if the mortgages are foreclosed by suit, the decrees of "court thereafter become the bases of title." (93 Ill., p. 402.

The conclusion that mortgages do not tend to create perpetuities within the rule laid down in *Carroll* v. *City of*

East St. Louis, and that, therefore, mortgages to foreign corporations were not obnoxious to this rule, or to the provision of the statute quoted, has been since re-affirmed by the same court in two cases, in which the validity of mortgages to the same company was directly involved. These cases, which will be referred to fully hereafter, are:

Stevens v. *Pratt*, 101 Ill., 206.
Commercial Union Assurance Co. v. *Scammon*, 102 Ill., 46.

And in the recent case of *Christian Union* v. *Yount*, 11 Otto, 352, involving the validity of a conveyance of lands in Illinois to a foreign corporation, this court took the same view of the doctrine of *Carroll* v. *East St. Louis*, and sustained the conveyance.

The question thus directly passed upon by the Supreme court of Illinois, is a question of local law, not only as involving the construction of a local statute, but as affecting the title to real estate in Illinois, and these decisions are therefore binding on this court under its established rule of decision.

In the face of these direct decisions it is not now even contended by counsel for plaintiff in error that the fact that the defendant in error was a foreign corporation, was sufficient to invalidate the mortgage in question, and unless the further ground of attack, which it is assumed by counsel is presented by the record, can be sustained, the validity of the mortgage is not only established but undisputed.

III.

THE CONTENTION OF PLAINTIFF IN ERROR THAT THE DEFENDANT IN ERROR WAS ORGANIZED FOR THE BUSINESS OF LOANING MONEY, AND THAT THE MORTGAGE IN QUESTION WAS MADE TO SECURE A LOAN OF MONEY MADE IN ILLINOIS, IN THE COURSE OF SUCH BUSINESS, AND THAT THEREFORE THE MORTGAGE WAS ORIGINALLY VOID, IS NOT SUSTAINED BY EVIDENCE, AND THE QUESTION OF LAW WHICH IT INVOLVES IS NOT PRESENTED BY THE RECORD.

The Supreme court of Illinois having decided that the fact that the defendant in error was a foreign corporation, did not affect the validity of the mortgage, the learned justice who gave the opinion went further, and *assuming* that it appeared in the record that the mortgage company was organized for the business of loaning money, *and* that the particular mortgage was taken in the course of such business in Illinois, announced the proposition that foreign corporations organized for the business of loaning money were prohibited by the policy of the state, as expressed in the incorporation law of 1872, from pursuing such business in the state, and that all acts of the company done in the furtherance of such business were invalid as obnoxious to the policy of the State.

On the basis of the same assumption of facts, counsel for plaintiff in error asserts the proposition as announced in this opinion as the ground of his attack on the validity of the mortgage in question, contending that the opinion of the Supreme court of Illinois conclusively establishes the proposition.

The question involved in the proposition asserted is not raised by the record, for the record does not disclose that the mortgage company was organized for the business of loaning money, nor that at the time of the loan and mortgage in question, it was doing business in the State of Illinois, nor that the mortgage and loan were made in pursuance of that business.

The existence of all these facts is essential to attack the transaction upon the ground indicated, and the existence of none of them appears.

The burden is on the attacking party. The presumption is wholly in favor of the mortgage company.

Am. Ins. Co. v. *Cutler*, 36 Mich., 261.
Scottish C. Ins. Co. v. *Plummer*, 70 Maine, 544.
Williams v. *Cheeney*, 3 Gray, 220.
Gelpcke v. *Dubuque*, 1 Wall., 223.
Thompson v. *Waters*, 25 Mich., 231.

In *Thompson* v. *Waters*, *supra*, a conveyance to a foreign corporation was attacked on the ground of the alleged want of capacity in the corporation to take title, but the record did not show affirmatively all the facts essential to present the question.

The court say:

"We are not allowed to presume illegality, but must "presume the transaction to have been legal until the con- "trary is shown. The conveyance must be held valid if "it was legally possible for the company to take the title, "for *any purpose* or upon any consideration *whatever*."

So in *Scottish Com. Ins. Co.* v. *Plummer*, *supra*, a foreign corporation brought suit on a bond taken by it in the course of its business in the state. It was con-

tended that the bond was void on the ground that the company had not taken out the license required by the laws of the state to authorize it to do business in the state.

The court say:

"The claim that, upon the agreed statement of facts, "the court should hold the bond void for illegality, pro- "ceeds upon a misapprehension as to where the burden "of proof falls in that respect. It is for one who asserts "the illegality of a contract, and would release himself "from its obligation on that ground, to make the facts "which support the claim appear in proof. Because the "statement is silent on the subject, the court will not "assume that either the company or the agent acted with- "out license, and therefore illegally. Where nothing "appears to the contrary, the presumption is in favor of "the legality of contracts, and the legal action of con- "tracting parties."

The prohibitory clause in the statute, which is the basis of the opinion of the State court, was limited to foreign corporations "doing business in this state." There was nothing in the statute, even in the view expressed in the opinion, to prevent the company from making a loan to a citizen of this state in New York, and enforcing the contract in the courts of Illinois, nor to prevent the company from receiving, through the borrower, as security for the loan thus made in the State of New York, a mortgage on property owned by him in Illinois.

The policy of laws of the character to which it is suppose the Illinois statute of 1872 belongs, is either to prevent foreign corporations from coming into a state to do business, or to subject their business to regulation when they do come, and such laws have no application to con-

tracts made out of a state, although affecting property within it.

Col. Ins. Co. v. *Kenyon*, 8 Vroom, 34.
Bartlett v. *Ins. Co.*, 18 Kan., 369.

So far as the record before the court discloses, the mortgage company might have been engaged in other business than that of merely loaning money, and the loan might have been incident to such other business.

The charter of the mortgage company from which alone the nature of its organization and business could be determined, is not incorporated in the record, and the only fact bearing on the question in the stipulation is, that it was a "corporation organized under and by virtue of "the laws of the State of New York, and still is a foreign "corporation."

There is nothing in the record to show the character of the business of the company, or that the particular mortgage was taken in the course of the business of loaning money in this state. The only facts agreed to on that subject, are that Lombard "negotiated a loan" from the company, and "for the purpose of securing the payment of the same," executed his mortgage. Where the loan was negotiated, whether the company was engaged in business in Illinois at the time, or whether the money was paid and the mortgage given in New York or Illinois, does not appear.

The opinion of the Supreme court of Illinois does indeed say (93 Ill., 492) that "the charter of that company "is not incorporated in the record, but from its name, the "character of its transactions here involved, and the facts "appearing in the case, we may reasonably conclude its "principal or sole business was and is, to loan money,

"taking to itself mortgages on real estate to secure the "same."

But we submit that the mere *name* of a corporation is not evidence upon which to base a decree invalidating a conveyance, and that, so far from the other facts in the case supporting the inference drawn by the Supreme court of Illinois, it is an inference not intended to be drawn by the parties to the record, and opposed to the settled rule of presumption in such a case.

IV.

IF IT IS ASSUMED THAT THE RECORD PRESENTS THE FACTS NECESSARY TO RAISE THE QUESTION OF THE VALIDITY OF THE MORTGAGE ON THE GROUND URGED FOR PLAINTIFF IN ERROR, THE DECISIONS OF THE SUPREME COURT OF ILLINOIS HAVE CONCLUSIVELY SETTLED THAT QUESTION IN FAVOR OF ITS VALIDITY.

Counsel for plaintiff in error, assuming that it appears from the record that the principal business of defendant in error was that of loaning money, and that the mortgage in question was taken in the course of that business in Illinois, relies upon the expression of opinion by the Supreme court of Illinois, in this case, that the mortgage was originally void, as obnoxious to the policy of the state as expressed in the law of 1872. He takes the broad ground that, "without discussing the particular reasons, "or quoting the authorities which led the Illinois court to "arrive at their conclusion," the opinion there expressed will be "taken as the law of this case." (Arg., p. 15.)

If it is meant by this proposition to assert, that by reason of the decision of the Supreme court of Illinois, the ques-

tion is *res adjudicata* in this court, we deny its correctness.

The jurisdiction of this court to review the case is based on the proposition that the validity of the statute of 1875 is drawn in question on the ground that it violates the obligation of the contract of the plaintiff in error by validating as against him a void conveyance.

The decision of the state court was in favor of the validity of the mortgage. This court is asked, in the exercise of its appellate jurisdiction, to determine that the mortgage was void, and to grant the appropriate relief.

If jurisdiction to review the decision of the state court has attached, it is an appellate and revisory jurisdiction. In the analogous case of *State Bank* v. *Knoop*, 16 How., 369, this court (page 391), referring to its jurisdiction on error from a state court, say:

"We are exercising an appellate jurisdiction. The de-"cision of the Supreme court of the state is before us "for revision."

Plaintiff in error asks this court to decide that the mortgage to defendant in error is void, and to decree that his mortgage is, therefore, a prior lien.

If the mortgage was originally valid, then the law of 1875 had no effect on the rights of the plaintiff in error, and before this court can conclude that the obligation of any contract of the plaintiff in error is violated, or that he is entitled to any relief on that ground, it must determine in the exercise of its appellate jurisdiction, the underlying question, whether the mortgage was in fact originally void.

The decision of the State court was in favor of the validity of the mortgage, and the opinion of the court is only important as showing the process of reasoning by which

it reached its decision. The decision is brought here for review, and the reasoning of the court is of value only so far as the reasons given may tend, as such, to convince the judicial mind.

Plaintiff in error cannot, by reference to the opinion of the State court, divide the question which this court is called upon to decide, and ask this court, in arriving at its decision, to accept as binding upon it so much of the opinion on the question as is in his favor, and to review, not the decision, but only so much of the opinion as is unfavorable to him.

We submit, that if this court has jurisdiction to review the decision of the State court at all, it is a contradiction of terms to say that its opinion, in the very case under review, is *res adjudicata* in this court, either on the general question of the validity of the mortgage, or on any incidental question which it passed upon in the process of the reasoning by which it arrived at its decision.

If, however, counsel for plaintiff in error only intends to assert that when this court is called on to pass upon a question of local law, and that question has been settled by the repeated decisions of the State court, such decisions may be referred to as binding on this court, we concede the proposition.

We concede that it is reserved to the states to determine, either by statute or general policy, whether foreign corporations shall do business therein. (Argument, p. 8.)

We also concede that whether the particular statute referred to was expressive of the general policy of the state to exclude corporations like the defendant in error, from doing business in the state, was a question of local law, and that if that question has been settled by the decisions

of the highest court of the state, those decisions are conclusive on this court. This rule of decision is firmly established in this court.

Nichols v. *Terry*, 5 Wall., 433.
VanRensallear v. *Kearney*, 11 How., 297.
Townsend v. *Todd*, 91 U. S., 452.
Williams v. *Kirkland*, 13 Wall., 306.
Port v. *Supervisors*, 105 U. S., 667.
R. R. v. *Bank*, 102 U. S., 14.

Not only is the question of the validity of this mortgage a question of local law, because depending on the construction of a state statute, but also because it affects the title to real estate in Illinois, and therefore falls within the long line of cases in this court, in which it is held that the decisions of the state courts on questions involving the title to real estate are binding on this court.

Jackson v. *Chew*, 12 Wheat, 153.
Beauregard v. *New Orleans*, 18 How., 497.
Chicago v. *Robbins*, 2 Black, 418.
Henderson v. *Griffin*, 5 Pet., 151.
Waring v. *Jackson*, 1 Pet., 570.
Lloyd v. *Fulton*, 91 U. S., 479.
Williamson v. *Suydam*, 6 Wall, 723, at p. 736.
Palmer v. *Low*, 98 U. S., 1, at p. 14.

The first expression of opinion by the Supreme court of Illinois, on the particular question affecting the original validity of the mortgage presented by counsel, is found in the opinion of that court in the present case, reported in 93 Ill., 492.

We have already shown that the particular question was not in fact presented by the record in the case, and it is settled by this court that if the case before the state court

did not call for a ruling on the particular question, then the court will not be concluded by such ruling.

Carroll v. *Carroll*, 16 How., 286.

Graves v. *Slaughter*, 15 Pet., 497.

But if we treat the expression of opinion of the state court in this case as rising to the dignity of a decision, the rule is well settled that on a question of the construction of a local statute or of local law, this court will follow the latest adjudication of the state court.

Green v. *Neal*, 6 Pet., 191.

Leffingwell v. *Warren*, 2 Black., 603.

Fairfield v. *County of Gallatin*, 100 U. S., 47.

So strict is this court in the enforcement of this rule, that it has repeatedly held that even where, by following a decision of a state court, it has, itself, arrived at a decision, and subsequently the state court overrules its former decision, this court will follow the latest adjudication of the state court, even to the extent of overruling its own previous decisions.

Id.

In the recent case of *Stevens* v. *Pratt*, reported in 101 Illinois, at page 206, the Supreme court of Illinois had occasion to pass upon the precise question of law on which it is claimed the ruling of that court in this case is conclusive, and to overrule its former decision on the particular question.

In that case the question of the validity of a similar mortgage to the defendant in error was directly presented, and all the facts necessary to its presentation, including the charter of the company, were before the court.

The court after quoting from its opinion, in *United States Mortgage Company* v. *Gross*, at length, and referr-

ing to the fact that its conclusions in that case were drawn in question in the case before it, say:

"The question of the validity of such contracts may be "far-reaching in its consequences and affect large prop- "erty rights. If they are valid upon any ground, the de- "cision should be placed on that ground, while if they are "invalid they should be so declared, and *the question put* "*at rest*, so that in the future they may be avoided. * * "* * * No reason exists, therefore, which should "preclude our re-examining the grounds of our decision "in *United States Mortgage Co.* v. *Gross*, *supra*, so far, "at least, as may be necessary to what we shall deem a "correct decision in the present case; but, on the con- "trary, in view of the importance of the questions involved, "it is a duty we owe to the court and to the public to do "so, with such care as we can exercise."

The court, thereupon, in an able and exhaustive opinion of twenty printed pages, review the opinion expressed in *United States Mortgage Co.* v. *Gross*, that the mortgages taken by the defendant in error were originally void, and hold:

1. That the court adhere to their former decision, that it was not designed by section 26 of the Incorporation law of 1872 to prevent corporations, domestic or foreign, from taking mortgages on real estate as security for debts.

2. That subsequent examination and reflection have convinced the court that they were clearly in error in holding that it is shown by the first section of that law that it was part of the policy of the state that corporations should not be formed in the state for the business of loaning money.

3. That, on further consideration and reflection, the court are convinced that they also erred in holding that

the first sentence of section 26 of that law manifests a policy that foreign corporations, such as defendant in error were to have no right to loan money in the State of Illinois.

4. That the note and mortgage in question were not void when given, but were valid and binding.

We will not repeat here the reasoning of the court in the case, but refer this court to the opinion itself, which is not only decisive as expressing the conclusion of that court, but conclusive in its reasoning upon the question as an original question.

For the convenience of the court, we have filed copies of this opinion as an appendix to this argument. (App., p. 1.)

In the subsequent case of *Commercial Union Assurance Co.* v. *Scammon*, 102 Ill., 46, the same question as affecting a mortgage to the same company, again came before the Supreme court of Illinois. In that case also the charter of the company was in evidence.

The court referred to and affirmed its previous decision in *Stevens* v. *Pratt*, *supra*. The court say:

"This court, in the recent case of *Stevens* v. *Pratt*, 101 "Ill., 206, had occasion to review the decision in the "Gross case, and that opinion was overruled in so far as "it held a mortgage void which was executed to a for- "eign corporation, after the adoption of the general in- "corporation act of 1872.

"The decision in *Stevens* v. *Pratt*, *supra*, is conclusive "of the question involved in the case. It will not be neces- "sary to repeat here the reasoning on which that decision "is based, but we content ourselves with a reference to "that case for a full expression of the views of the court "on that question."

We have also printed a copy of this opinion for the convenience of the court, in the appendix to this argument. (App., p. 29.)

Subsequent to the decision in *Stevens* v. *Pratt* and *Commercial Union Assurance Co.* v. *Scammon*, petitions for rehearing were filed in those cases, and the question was thus again brought before the Supreme court of Illinois. Both petitions were denied, and a *per curiam* opinion was filed announcing the adherence of the court to its former ruling. (App., p. 25.)

In that opinion the court, after considering the arguments urged in the petition for rehearing, announce its conclusion in the following language:

"We have patiently, and with such care as we can be-
"stow, consistently with other duties, gone over and re-
"considered every portion of the opinion, and we perceive
"no reason to take back or modify anything therein
"said."

In the petition of rehearing in *Stevens* v. *Pratt*, it was contended that the Supreme Court of Illinois was concluded in that case by its previous opinion in *United States Mortgage Co.* v. *Gross*, on the ground that plaintiff had acquired the title which he asserted, subsequent to, and on the faith of, that decision. Substantially the same argument, as is now urged to this court, to sustain the proposition that the opinion referred to, is conclusive in this case, was thus presented to the Supreme Court of Illinois. That court, in its opinion denying the rehearing, say: "The title or claim we held good in
"*United States Mortgage Co.* v. *Gross*, we still hold
"good, though for a different, and, we think, more satis-
"factory reason. * * * * We have simply placed
"our ruling on different, and, as we think, stronger

"ground. * * * * It is nowhere decided that par-"ties have vested rights in the reasons assigned for de-"cisions."

In view of these repeated decisions of the Supreme Court of Illinois, it must now be regarded as the settled law of that state, arrived at with much deliberation and care, and with a view, as the court announce, of "put-"ting the question at rest," that there was no policy or statute of the state making the mortgages to defendant in error void, but that all such mortgages were valid and binding when given.

V.

IF THE CASES OF STEVENS V. PRATT AND COMMERCIAL ASSURANCE COMPANY V. SCAMMON ARE NOT BINDING ON THIS COURT, THE CONCLUSION THERE ARRIVED AT IS SUSTAINED BY A WEIGHT OF REASON AND AUTHORITY, WHICH SHOULD DETERMINE THE QUESTION.

We might well rest this proposition on the reasoning of the court, and the authorities cited in the able and exhaustive opinion in *Stevens* v. *Pratt*, but in view of the importance of the question, we will add a brief recapitulation of the reasons sustaining the conclusion of the court in that case, and a reference to decisions of this court, which, we contend, are in themselves decisive of the question on principle.

In the leading case of *Bank of Augusta* v. *Earle*, 13 Peters, 588, this court determined the following principles:

1. That although a corporation must live and have its being in the state of its creation, it does not follow that its

existence there will not be recognized in other places, and its residence in one state presents no insuperable objection to its power of contracting in another.

2. That it is a rule of comity that in the absence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests.

3. That this rule of comity applies to the different states, between whom, even a greater degree of comity and friendship should be presumed than between foreign nations.

4. That by this law of comity, foreign corporations are permitted to make contracts, and to sue in the courts of a state, in the absence of some statutory provision or settled policy to the contrary, and this comity will be presumed from the silent acquiesence of the state.

In *Cowell* v. *Springs Co.*, 10 Otto, 59, the court state the rule of comity as now settled in this court, as follows: "If the policy of a state or territory does not permit the "business of a foreign corporation in its limits, or allow a "corporation to acquire or hold real property, it must be "expressed in some *affirmative* way. It cannot be inferred "from the fact that its legislature has made no provision "for the formation of similar corporations, but allows cor- "porations to be formed only by general law." And the principle is referred to as the "general comity which, in "the absence of positive direction *to the contrary*, obtains "throughout states and territories of the United States."

And in *Christian Union* v. *Yount*, 11 Otto, 352, the doctrine of the case last cited is affirmed, and the language quoted with approval.

In the light of the obvious distinction between mortgages to secure indebtedness and conveyances in fee simple, affirmed in *United States Mortgage Company* v. *Gross*, and *Stevens* v. *Pratt*, it seems clear that prior to the act of July 1, 1872, there was nothing in the statutes, or policy of the State of Illinois, prohibiting foreign corporations from loaning money on mortgages on land in Illinois.

The whole course of the legislation of the state, both general and special, shows that it was the settled policy of the state to authorize corporations to make loans on real estate securities.

In pursuance of this policy, it authorized all savings banks, loan and trust companies, insurance companies, and numberless others which it created, to loan their funds on real estate security. And there is no provision in its statutes making any discrimination on that subject as to foreign corporations, by denying them the right so freely given to home corporations.

It cannot be contended that prior to the law of 1872 there was anything in the statutes or decisions of the state discriminating against the transactions of corporations, whether home or foreign, organized for the business of loaning money, and in favor of other corporations, such as insurance companies, making similar loans.

Nor can it be correctly asserted that up to July 1, 1872, there was any general policy of the State of Illinois opposed to the creation of corporations to engage in the business of loaning money. On the contrary, the private laws of the state are full of instances of the creation of corporations for that purpose by special charter.

See opinion in *Stevens* v. *Pratt*, (App., p. 20.)

And if the general assembly thus authorized such corporations, it cannot be argued that there was any intention to exclude the corporations of other states engaged in like business.

If any doubt could arise as to the general policy of the state on this subject, this doubt was solved by the law of 1875, by which the legislature of the state —the authorized exponent of its policy—put at rest all questions as to what its policy was, or had been, declaring, not only that it was the then policy of the state to favor loans by foreign corporations, but that such had been its policy, and that all prior loans made by them were valid.

This amounted to a legislative declaration of the general policy of the state, of a most decisive character.

Hall v. *Sullivan*, 2 Redf. Ry. Cases, 621.
Stevens v. *Pratt*, (App., p. 23.)

But in the opinion of the State court, relied upon by plaintiff in error, sections 1 and 26 of the general law of 1872 concerning corporations (Rev. Statutes 1874, chap. 32, p. 285) are regarded as establishing a settled policy in the state against foreign corporations engaged in the business of loaning money.

Section 1 of that act provides that corporations *may* be formed in the manner provided by the act for any lawful purpose, except banking, insurance, real estate brokerage, the operation of railroads, and the business of loaning money.

In the opinion referred to the court assumes that this law was intended to operate as a prohibition against the formation of corporations for the excepted purpose of loaning money, and was a declaration of the policy of the state against the formation of such corporations. If this reasoning is correct, it would follow that the law was

also a declaration of the policy of the state that corporations should not be formed for any of the other excepted purposes, including insurance, and the operation of railroads. Clearly this was not the purpose of the exception. The scope of the law was to provide a method for forming corporations for all purposes other than the excepted purposes, leaving the subject of the formation of corporations for those purposes to be provided for by other laws.

It does not follow that because the legislature did not regard the provisions of that law as adapted to corporations formed for the excepted purposes, they intended thereby to declare that the policy of the state was against the formation of such corporations, or to prohibit them.

On the contrary, there was at that time in force as one of the statutes of the state a general law providing for the formation of insurance companies, which it has not been supposed that the statute of 1872 operated to repeal. And at the same session of the legislature at which the law of 1872 was adopted, another law was passed providing for the formation of corporations for the operation of railroads, which has ever since been in force.

It is true that neither in 1872 nor subsequently did the general assembly pass a general law for the formation of corporations for the business of loaning money, but this proves nothing. Such corporations are formed where capital accumulates, and there are many lenders. The people of Illinois, in 1872, and at least down to 1875, were borrowers and not lenders, and the legislature may have well believed that the many institutions for loaning money created by special charter were for the time sufficient to supply the demand, in conjunction with the capital brought into the state by foreign corporations.

Again, the fact that subsequent legislatures have not matured a law for the formation of such corporations is no evidence that it was the intention of the particular legislature adopting this law to declare against the policy of forming such corporations.

The utmost that the argument from section 1 comes to is that since the constitution of 1870, private corporations can be created in this state only under general laws, and that prior to 1875 the legislature of the state had passed no general law authorizing the formation of corporations for the business of loaning money.

The question involved in this argument was passed upon by this court in the recent case of *Cowell* v. *Springs Company*, 10 Otto, 55.

In that case a corporation was created under the laws of Pennsylvania with power to explore, locate and improve lands, and colonize, organize and form settlements; and in pursuance of the purpose of its incorporation, acquired lands in Colorado. By the laws of that territory the legislature was prohibited from granting special charters, and was only authorized to create corporations by general laws for certain purposes which did not include the purposes for which the Pennsylvania corporation was formed. A title acquired by deed to this company was attacked in an action of ejectment on the ground that if domestic corporations could not be created under the existing laws with the powers which its charter conferred, foreign corporations could not lawfully exercise such powers in the territory.

The court say: "The answer to this position is found "in the general comity which, in the absence of positive "proof to the contrary, obtains throughout the states and "territories of the United States, by which corporations

"created in one state or territory are permitted to carry "on any line of business in any other state or territory, "and to acquire, hold or transfer property there equally "as individuals.

"If the policy of the state or territory does not permit "the business of foreign corporations in its limits, or allow "the corporation to acquire or hold any property, it must "be expressed in some *affirmative way. It cannot be in-* "*ferred from the fact that its legislature has made no pro-* "*vision for the formation of similar corporations, or allows* "*corporations to be formed only by general law.*

"Telegraph companies did business in several states "before their legislatures had created or authorized the "creation of similar corporations, and numerous corpora- "tions existing by special charters in one state are now "engaged without question in business in states where "the creation of corporations by special enactments was "forbidden."

This decision was approved, and the language of the opinion adopted in *Christian Union* v. *Yount*, 11 Otto, 352.

It was held in the opinion relied on by plaintiff in error that the last clause of section 26, prohibiting corporations from purchasing or holding real estate, except as provided in the act, was aimed at perpetuities, and had no application to loans on mortgages, but the court finds support to the idea of a prohibitory policy in the following clause of that section: "Foreign cor- "porations and the officers and agents thereof doing "business in this state shall be subjected to all the liabili- "ties, restrictions and duties that are or may be imposed "upon corporations of like character organized under the

"general laws of this state, and shall have no other or "greater powers."

1. This provision is only a regulation and limitation of the powers of foreign corporations, designed to put them upon the same footing with domestic corporations engaged in the same business. It does not purport to be, and is not a denial of power, and its operation is confined by its language to cases where corporations "of like character," have been "organized under the general laws of this state."

2. If, at the time of the transaction in question, the legislature had not provided for the organization of domestic corporations of "like character," "under general laws," and had not, therefore, defined their powers, it would only follow that no regulations had yet been adopted as to foreign corporations of the same character.

And although if the state had chosen, it could undoubtedly have adopted special regulations as to foreign corporations of this particular kind, this it had not done.

3. The argument that infers from the general language of the provision under consideration, a denial of all rights and powers to foreign corporations of a particular class, because no provision had been made by general law for the organization of domestic corporations of like character, rests on the same reason which infers the policy of the state against foreign corporations doing business in the state, from the fact that they have provided for no similar corporations of their own, and is met by the reasoning and conclusion of *Cowell* v. *Springs Co.*, *supra*, and *Christian Union* v. *Yount*, *supra*.

4. The statute was obviously intended to regulate the formation and business of the classes of corporations provided for. It has no application to those corporations ex-

cepted from its operation by section 1. Their duties and powers are left to be regulated by other appropriate laws, and the familiar rule of construction should limit the general language of this provision to the classes of corporations to which the law relates.

See *Wincock* v. *Turpin*, 96 Ill., 144.
Stevens v. *Pratt*, (App., p. 12.)

5. The provisions of the act of 1872 cannot be held to amount to a prohibition in express language, and in the opinion referred to they are not so regarded, but are said to be a declaration of the policy of the state.

Potter's Dwarris, 215.

The policy of prohibiting corporations engaged in the business of loaning money was clearly not the policy of Illinois up to the time of the enactment of the law of 1872, and was certainly not its policy when the act of 1875 was approved.

The condition and necessities of the state in 1872 estabish that its interest, so far from calling for such a prohibition. demanded every encouragement for the loaning and investment of foreign capital within its limits, and especially in the city of Chicago, then just prostrated by the great fire.

No reason of policy or public interest can be suggested, in view of the well known facts, which would lead the legislature to prohibit this class of capitalists from coming into the state with money toloan to its citizens.

Nor can any reason be assigned for attributing to the legislature a fixed determination that corporations engaged in the business of loaning money should not be created in the state.

6. "The comity between the states," says the opinion relied on (page 493), "does not demand we should hold

"this mortgage company, incorporated under an act of "the State of New York, could lawfully, within this state, "exercise powers *denied* to corporations within our own "borders."

Can it be justly assumed that because between July, 1871, and July, 1875, no general law providing for the formation of companies to loan money was passed, therefore, the exercise of that power was *denied* to corporations in Illinois?

The ruling in *Cowell* v. *Springs Co.*, *supra*, and *Yount* v. *Christian Union*, *supra*, that, because no provision is made for the formation of similar corporations under the laws of a state, it is not, therefore, to be inferred that foreign corporations were intended to be excluded, is decisive of this question.

The actual transaction, viz: loaning money to a citizen of the state, and taking a mortgage to secure the loan, it is not pretended is prohibited by the policy of the state, either to its own or foreign corporations.

Under the reasoning of the opinion, foreign insurance companies could come into the state and loan money to any extent. But what objection can be suggested against such loans when made by a foreign insurance company, which would not apply to the loans made by corporations organized for the business of loaning money? The transaction is the same in its character and effect, and the same objections which would apply to a number of such transactions in the aggregate by a foreign loaning company would apply with equal force to loans by foreign insurance companies of an accumulated surplus capital.

VI.

NEITHER THE MORTGAGOR NOR THE PLAINTIFF IN ERROR CAN DENY THE VALIDITY OF THE MORTGAGE.

It is undisputed that the Mortgage Company made an actual loan of money to the mortgagor; that the money was paid to him on the faith of the security afforded by his mortgage, and that by the mortgage he acknowledged the receipt of the money, and assumed to secure its repayment. Nor is it pretended that any portion of the money thus received has been refunded. It is also clear, as we shall show in another connection, that the plaintiff in error took with notice of all the facts in relation to this mortgage.

The prohibitory provision of the act of 1872 is manifestly aimed at foreign corporations "doing business in this state." It cannot be construed as absolutely denying to any class of foreign corporations an existence in the state, or as taking from them the right to sue and be sued, and to accept securities for obligations contracted in business done out of the state, and to enforce such securities in its courts.

The transaction itself, viz: loaning money on mortgage security was neither *malum in se* nor *malum prohibitum*, and the sole ground of attack on the mortgage is the alleged want of power of the corporation to engage in the particular transaction.

On these facts two questions are presented:

1. Could the mortgagor, having received the benefits of the transaction, repudiate the mortgage, and maintain a suit to set it aside?

2. Can the mortgagor's grantees, taking their title with notice of the facts, maintain such a suit?

1. The first question comes to this, whether in a suit in which this corporation, having a legal existence in the state, and having the power to hold title to property for some purposes, defends, a mortgagor who has received money on the faith of his mortgage, can be heard to deny its validity on the ground of want of power in the corporation.

The principle of equitable estoppel has its foundation in a wise policy, and its purpose is to prevent wrong and injustice where the application of the strict rules of law might lead to such results.

The tendency of the modern cases, particularly in this country is, to extend this doctrine to all cases which come within the reason on which it rests, without confining it by artificial limitations, and no court has gone further in this direction than this court.

As a logical result of this doctrine it is now well settled that a party having enjoyed the fruits of a contract fairly made, cannot be heard to deny its validity and avoid its obligation on the ground of want of power in either party making it.

This principle has been frequently applied in cases where corporations have sought to deny the binding obligation of a contract executed by the other party.

The converse of the proposition necessarily follows, and it is well settled that where the benefit flows from the corporation to the person dealing with it, he is also equitably estopped from denying the validity of the transaction on the ground of the want of corporate power.

This principle is thus stated in *Darst* v. *Gale*, 83 Ill., 140: "The general rule is that the plea of *ultra vires*

"shall not prevail, when instead of advancing justice it "would accomplish a wrong, and it makes no difference "in this respect whether it is interposed for or against "the corporation."

In *Whitney Arms Company* v. *Barlow*, 63 N. Y., 63 the subject was fully considered, the court holding that where a corporation has performed on its part a contract to manufacture certain articles, it is no defense to an action brought to recover the purchase price, that the contract was not within the charter powers of the corporation. The court say: "If the other party has had "the benefit of the contract fully performed by the cor- "poration, he will not be heard to object that the contract "and performance were not within the legitimate powers "of the corporation."

In *Railway Co.* v. *McCarthy*, 96 U. S., 267, this court say: "The doctrine of *ultra vires*, when invoked for or "against a corporation should not be allowed to prevail "where it would defeat the ends of justice or work a "legal wrong."

It is well settled that where a party has availed himself for his benefit of an unconstitutional law, he cannot in a subsequent litigation aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit.

Daniels v. *Tearney*, 12 Otto, 421, and cases cited.

In *Daniels* v. *Tearney*, 12 Otto, 415, a bond was given in pursuance of a void law. The court held that although the bond was void, the obligors, having received the benefit, were estopped from denying its validity. The court say: "Not to apply the principle of estoppel to the

"bond in this case would be, it seems to us, a mockery in "judicial administration, and a violation of the plainest "principles of reason and justice."

In *United States* v. *Hodson*, 10 Wall., 395, the court say: "When a bond is voluntarily entered into and the prin- "cipal enjoys the benefits it was intended to secure, and a "breach occurs, it is then too late to raise the question of "its validity. The parties are estopped from availing "themselves of such a defense."

In *Scholey* v. *Rew*, 23 Wall., 331, the court held that an alien to whom a devise of an interest in real estate had been made, and who had received its value in proceedings for partition, was estopped from setting up against a demand for a succession tax thereon, that by the law of the state where the estate was, the devise was null and void on account of his alienage.

In *Kirk* v. *Hamilton*, 12 Otto, 68, it was claimed that a trustee's sale was void. The court held that a party who had stood by and permitted a purchaser to take possession and make valuable improvements without objection, was estopped from denying the validity of the sale.

See also:

Mott v. *The U. S. Trust Co.*, 19 Barb., 569.

Steam Navigation Co. v. *Weed*, 17 Barb., 378.

Chester Glass Co. v. *Dewey*, 16 Mass., 102.

McCutcheon v. *Steamboat Co.*, 13 Pa. St., 13.

There can be no distinction between instances where the alleged want of authority to contract grows out of a want of power in the charter, and where it arises from an

alleged want of power to transact a particular business in a particular locality.

The case of *Newburg Petroleum Co.* v. *Weare*, 27 Ohio St., 343, is directly in point.

In that case a corporation organized under the laws of New York, had taken an assignment of certain leaseholds of oil lands in Ohio. Defendant, Weare, entered into a contract with the corporation, by which it was to transfer the leaseholds to him, and he was to pay the corporation a certain proportion of the product. Under this contract he received a large amount of oil, and set up as a defense to the suit the alleged want of authority of the corporation to take or transfer title to leaseholds *in Ohio.*

The court (p. 354) say:

"Weare is estopped from denying the power of the "plaintiff to make a legal contract for the transfer of the "leaseholds to him, and from denying the right of the "plaintiff to maintain an action to compel him to account. "A person benefited by a contract, holding on to it and "receiving the benefits arising out of it, cannot, in this "collateral manner, question its validity. As the contract "was a legal one, there can be no further question in this "proceeding about the legal organization of the corpora-"tion, or *its power to do business in Ohio.*

"Good faith requires that a person who has recognized "the existence of a corporation by dealing with it openly "with full knowledge of its business character, and is yet in "the enjoyment of the fruits of the transaction with it "under the contract, should be estopped from denying, in "this collateral manner, the power of the corporation to "enter into the contract."

It will be observed that some of the foregoing cases

relate to contracts and others to mortgages or deeds of conveyance.

In either case the principle is necessarily the same.

In the case at bar the invalidity of the mortgage is asserted because of its connection with the business of loaning money, and of the alleged invalidity of the indebtedness which it was given to secure, and whatever confirms the indebtedness necessarily confirms the mortgage. And the same facts which would prevent the mortgagor from denying the valdity of the bond are equally conclusive against him when asserting the invalidity of the mortgage given as a part of the transaction, and on the faith of which the money was paid him.

2. *The plaintiff in error took only the title which the mortgagor had and subject to the same equities.*

The mortgage to the mortgage company had been recorded long before the mortgage was given on which the plaintiff's alleged rights are based. This was an "instrument in writing" relating to real estate within the meaning of the recording law of Illinois, and if its invalidity as a conveyance is conceded ft, yet served as notice o the facts which it recited.

Morrison v. *Brown*, 83 Ill., 562.

In the case cited, the Supreme court of Illinois held that a deed of trust given by a married woman to secure a balance of purchase money, while it had no validity as a conveyance, was effectual as notice. The court say:

"It is undoubtedly the policy of our recording laws "that every *instrument in writing* relating to land when "once recorded shall be notice to the world of everything "stated in such instrument and of everything that is "necessarily implied in the words of the recorded instru-

"ment. These appellants claiming as subsequent *bona* "*fide* purchasers of incumbrances, occupy the same posi- "tion in this case as they would have done had this in- "strument, not having been recorded, been read aloud to "them by the appellees before they became in any way "interested in this question."

In this case, therefore, plaintiff in error had notice from the records of all the facts shown by the mortgage itself.

And if a knowledge of any details not disclosed on the face of the mortgage was needed to place him in the exact position of the original mortgagor, he is also chargeable with notice of all facts which he could have learned from the inquiry which the record suggested.

Shepardson v. *Stevens*, 71 Ill., 646.

Not only this, but the record shows that the insurance company under which plaintiff in error claims, took its title subject to the mortgage to defendant in error, and assumed its payment by the very conveyance under which plaintiff in error claims, and the law is well settled that he is chargeable with notice of all facts which thus appear in the chain of his title.

The principle is universal that a party who purchases with notice of the facts stands in the precise position of his vendor, and takes his title subject to the same equities. And this principle has been frequently applied in cases of equitable estoppel.

Lee v. *Getty*, 26 Ill., 76.
Shaw v. *Beek*, 35 Vt., 209.
Thistler v. *Buford*, 50 Mo., 275.
Snodgrass v. *Richetts*, 13 Cal., 539.
Dickenson v. *Colgrove*, 10 Otto, 78.

VII.

THE LEGALITY OF THE ACTION OF THE CORPORATION IN MAKING THE LOAN CANNOT BE DRAWN IN QUESTION IN THIS SUIT.

That the mortgage company could exercise some powers, and acquire title to real estate in the state for *some purposes*, must be conceded. It could sue and be sued, and it could claim any of those rights which might be incident to the enforcement of obligations contracted out of the state, or rights acquired through business done in another state. And if it recovered judgment, it could exercise the or dinary right of a creditor to bid at the sale, and take the title as its security, or in satisfaction. And if it could take title to secure a debt through a judgment sale, it could settle with its debtor, a debt contracted out of the state, without suit, and take title by mortgage to secure the indebtedness.

The opinion relied on has relation wholly to corporations doing business in the state. All contracts made in the transaction of business elsewhere would be entirely valid, and could be enforced in Illinois.

It is perfectly clear that the mortgage company would have the right to assert rights acquired out of the state, and, as a consequence, to acquire real estate for some purposes. And if a corporation can take title to land for ome purposes, the question whether the particular titles was taken for an unauthorized or prohibited purpose cannot be tried collaterally.

National Bank v. *Matthews*, 98 U. S., 628, and cases cited.

Hough v. *Cook Co. Land Co.*, 73 Ill., 23.
Union Water Co. v. *Murphy's Flat Fluming Co.*, 22 Cal., 621.
Grant v. *Henry Clay Coal Co.*, 80 Pa. St., 218.
Leazure v. *The M. Ins. Co.*, 10 Pittsburgh, L. J. (N. S.), 80.

In *National Bank* v. *Matthews*, 98 U. S., 628, it is said:

"When a corporation is incompetent by its charter to "take a title to real estate, a conveyance to it is not "void, but only voidable, and the sovereign alone can ob- "ject. It is valid until assailed by a direct proceeding for "that purpose. *Leazure* v. *Hillegas*, 7 Serg. and R. (Pa.), "313; *Goundie* v. *Northampton Water Co.*, 7 Pa. St., 233, "*Runyon* v. *Coster*, 14 Pet., 122; *The Bank* v. *Poitiaux*, "3 Rand (Va.), 136; *McIndoe* v. *The City of St. Louis*, "10 Mo., 577. See, also, *Gold Mining Co.* v. *National* "*Bank*, 96 U. S., 640. The authority first cited is elab- "orate and exhaustive upon the subject."

In *Grant* v. *Henry Clay Coal Co.*, 80 Pa. State, 218, a corporation of the State of Massachusetts owned extensive leases of coal mines in Pennsylvania. In a suit brought by it in Pennsylvania to recover for coal furnished to the defendant, it was objected that a foreign corporation had no power to hold such leases, and therefore the contract was illegal. The court say: "Nor is there any question "raised upon this record as to the right of this company "as a foreign corporation to hold real estate, or even min- "ing leases in this State. If the commonwealth has any "interest in such inquiry, it can be made by her proper "officer. It is a matter with which the plaintiffs in error "have no concern."

For the alleged misuser in the case at bar the appropriate remedy could be sought either in the courts of New York or those of Illinois.

The statute of Illinois on the subject of *quo warranto* (Rev. Stat. 1874, Chap. 112, p. 787; Cothran's Statutes, p. 1117), provides that if any person shall unlawfully hold or execute any office or franchise, or any corporation exescises powers not conferred by law, proceedings by information may be taken; and if the defendant resides, or is out of the state (section 3), service by copy may be had, as in chancery cases.

In *U. S. Trust Co.* v. *Lee*, 73 Ill., 147, in which it was held that *the application* of a foreign corporation to be appointed trustee must be denied, Mr. Justice WALKER says: "But, whatever may have been the common law as to "domestic corporations, we should regard a foreign cor- "poration as liable to be placed in the position of an alien. "All the authorities agree that an alien can not be a trus- "tee, and the reported cases agree that a state may, at "pleasure, prohibit foreign corporations from transacting "business within its limits; that it is only by permission, "express or implied, that such bodies, or their acts in the "state, are recognized as legal or valid."

This analogy between a foreign corporation and an alien is adopted in many cases.

Leazure v. *Hillegas*, 7 Serg. and Rawle, 313.

Baird v. *The Bank of Washington*, 11 Serg. and Rawle, 418.

Farmers' L. & T. Co. v. *McKinney*, 6 McLean, 6.

Now, what is the rule as to an alien?

In *Farmers' L. & T. Co.* v. *McKinney*, 6 McLean, 5, the court says:

"It seems to be a settled principle that a title acquired "by an alien by purchase, is not divested until office found. "The divestiture requires some notorious act from which "it may appear that the freehold is in another. (1 Bac. "Abr. Alien, 6, 133; Page's Case, 5, Co. 22.) Even after "office found, the king is not adjudged in possession unless "the possession be vacant. He must enter or seize by his "officer."

And this court, in *National Bank* v. *Matthews*, *supra*, approves of and applies the analogy: "*So* an alien, for- "bidden by *the local law* to acquire real estate, may take "and hold title until office found. (*Fairfax's Devisees* v. "*Hunter's Lessees*, 7 Cranch., 604.)"

In *Leasure* v. *Union Mutual Insurance Co.*, 10 Pittsburgh L. J. (N. S.), 80, the Union Mutual Life Insurance Company of Maine took a mortgage on lands in Pennsylvania to secure a loan. On proceedings to foreclose, the mortgagor set up as a defense that the corporation had no authority to loan money in the State of Pennsylvania, and take mortgages on real estate in that state.

The court in overruling the defense say:

"That a foreign corporation can contract with a citizen "of this state, and enforce the contract by suit in the "courts, has never been controverted. *Bank of Augusta* "v. *Earle*, 13 Peters, 519. By the common law, alien "friends could always sue, and there is no distinction in "this respect between natural and artificial persons. Why, "then, may not the performance of such contracts be se- "cured by a mortgage as well as a judgment? Both are "merely liens. It is true that a mortgagee can bring eject-

"ment and recover possession of the land. Should a for-
"eign corporation resort to this remedy or become the
"purchaser at sheriff's sale a different question would
"arise. But that even could not release the debt or de-
"stroy the validity of the title, except as against the com-
"monwealth. The commonwealth indeed might enforce
"its claim by virtue of the statutes of mortmain. *Leasure*
"v. *Hillegas*, 7 S. & R., 320. But the grantor or mort-
"gagor could not set up that as a defense against his own
"conveyance or mortgage."

In this case the assumed invalidity of the mortgage arises, not so much from the want of capacity to take title as the alleged illegality of the loan it was given to secure, and there is, therefore, so much the stronger reason or not allowing the validity of the mortgage to be questioned in this action.

The supposed invalidity of the mortgage is based on the claim that the statute of 1872 prohibited the defendant in error from loaning money in Illinois. But assuming that it was the intention of this statute to prohibit the loan, it does not follow that it was the intention of the legislature that the contract given to secure a loan actually made, should therefore be void.

A statute must be examined as a whole, to determine whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so. Whatever may be the structure of the statute in respect to prohibition, and penalty, or penalty alone, it is not to be taken for granted that the legislature meant that contracts in contravention of it were to be void, in the sense that they were not to be enforced in a court of justice.

Harris v. *Runnels*, 12 How., U. S., 79.

That case was assumpsit upon a note given for slaves purchased by defendant of the plaintiff, and brought into the State of Mississippi in contravention of a state statute. The court held the defendant liable. The court say (p. 85): "If, then, there was a violation of the law by his pur- "chase, he (the defendant) stands *in pari delicto* with the "seller, with this difference between them, that he is now "seeking *to add to his breach of the law, the injustice "of retaining the negroes without paying for them.*"

In *National Bank* v. *Matthews, supra*, A executed a promissory note to B, and to secure its payment a deed of trust of lands, which was in effect a mortgage with a power of sale annexed. A national bank, on the security of the note and deed, loaned money to B. The court said that section 5136 of the national banking act, "does not, in "terms, prohibit a loan on real estate, but the implication "to that effect is clear. What is so implied is as effectual "as if it were expressed," but held, nevertheless, that the bank was entitled to enforce the collection of the note by a sale of the lands. Mr. Justice Swayne says: "The stat- "ute does not declare such a security void. If congress "so meant, it would have been easy to say so; and it is "hardly to be believed that this would not have been done, "instead of leaving the question to be settled by the un- "certain result of litigation and judicial decision. * * "* Where a corporation is incompetent, by its charter, "to take a title to real estate, a conveyance to it is not "void, but only voidable, and the sovereign alone can "object. We cannot believe it was meant that stock- "holders, and perhaps depositors and other creditors, "should be punished and the borrowers rewarded, by "giving success to this device whenever the offensive fact "shall occur. The impending danger of a judgment of

"ouster and dissolution was, we think, the check, and "none other, contemplated by congress."

The general incorporation law of 1872 denounced no penalty upon the doing business in Illinois by corporations created for the object of loaning money. It did not declare contracts made in the transaction of such business void. It did not, in terms, prohibit such transactions.

The opinion referred to simply argues that it may be inferred from sections 1 and 26 of the act, that it was the policy of the state that corporations organized in other states for the business of loaning money, should not be allowed to pursue such business in this state.

Does it follow that a loan made by such a corporation must be held illegal to such an extent that the person receiving the money could refuse to repay it, and at the same time defeat a recovery?

Can it be contended that it was the intention of the legislature that the general provisions of this law whose primary object was to provide for forming domestic corporations, should be construed as not only prohibiting the many corporations belonging to the excepted classes from continuing business in the state, but as declaring absolutely void every contract made by them after the date it went into effect? Would not so radical and severe a change in policy have been embodied in some distinct law, or at least some express provision plainly declaring its effect? Would it have been left to be gathered by implication and construction from the supposed "policy" of a law relating to a wholly different subject?

Upon what reasonable ground can it be argued that the loaning of money by a corporation, having that for its business, was deemed so obnoxious to the policy of the

state, and so prejudicial to its interests, that the intention of the legislature was to prohibit it to the extent of having all loans so made rendered absolutely void, and not only all remedy denied as against the borrower, participating in the transaction and holding its fruits, but the latter permitted to regain the security, while keeping the money?

From what point of view can this court detect in the transaction itself such criminal and dangerous ingredients as to feel compelled to impute to the general assembly the intention of attaining a result so contrary to justice, and so shocking to the moral sense?

VIII.

THE LAW OF 1875 WAS RETROACTIVE, AND CURED ANY ALLEGED INVALIDITY OF THE MORTGAGE.

1. *The law was retroactive.*

As the Supreme court of Illinois says (page 494): "It "is expressly so on its face."

The construction of the act is obvious. By its terms, corporations formed under the laws of any other state or country, and authorized by their charters to invest or loan money, may invest or loan money in this state, and where they have, prior to the act going into effect, invested or loaned money *as aforesaid*, that is, as authorized by their charters, they may have the same *rights* and *powers* for the recovery of such loans or investments as private persons, citizens of this state; that is, the power to foreclose mortgages or enforce rights resting in contract as well as the right to prosecute suits, all powers and rights that the citizen possesses or can exercise.

And corporations so situated may, under the act, purchase at sales, on judgments or decrees in their own favor, on their own loans or investments, and on mortgages or deeds given to or for them, to secure such investments and loans.

2. *The law cured any alleged defect or invalidity of the mortgage to the Mortgage Company.*

We have seen that plaintiff in error took whatever title he has, with notice of the mortgage, and of the facts which it recites.

Morrison v. *Brown*, 83 Ill., 562.
Shepardson v. *Stearns*, 71 Ill., 646.

He therefore had knowledge of all the facts of the transaction which tended to create any obligation, equitable or moral, as against the mortgagor.

He had notice that the mortgagor held the title subject to:

1. The moral obligation to make effectual the security which it was intended to give, and on the faith of which the money had been loaned to him.

2. The equitable estoppel which the facts of the transaction created, and which precluded him from denying in a court of justice the validity of the security.

In the light of the authorities, the existence of either of these equities would sustain, as against the mortgagor, a retroactive law perfecting the security and carrying out the intention of the parties in furtherance of justice.

The general principle is thus stated by Judge COOLEY: "When such acts (retrospective) go no further than to bind "a party by a contract which he has attempted to enter "into, but which was invalid by reason of some personal "inability on his part to make it, or through some neglect

"of some legal formality, or in consequence of some in-
"gredient in the contract forbidden by law, the question
"which they suggest is one of policy and not one of con-
"stitutional power."

Cooley on Constitutional Limitation, page 374, and cases cited.

See, also,

Goshen v. *Stonington*, 4 Conn., 210.
Beach v. *Walker*, 6 Conn., 197.
State v. *Newark*, 27 N. J. Law, 197.
Foster v. *Essex Bank*, 16 Mass., 245.
Cavran v. *Mut. Benefit Life Ins. Co.*, 52 Pa. St., 287.
Lane v *Nelson*, 79 Pa. St., 407.
Lewis v *McElvain*, 16 Ohio, 347.
Butler v. *Toledo*, 5 Ohio St., 225.

The principle is a universal one that a purchaser who takes with notice of all the facts, stands in no better position than his vendor.

Lee v. *Getty*, 26 Ill., 80.
Shaw v. *Beebe*, 35 Vt., 209.
Thistle v. *Buford*, 50 Mo., 278.
Snodgrass v. *Ricketts*, 13 Cal., 359.
Wade on Notice, Sec. 48.

It is only the *bona fide* purchaser who occupies a better position than his grantor. A purchaser with notice is, in law, *mala fide*, and stands in his grantor's shoes.

It was because of this principle that Judge COOLEY drew the line of distinction, that retroactive laws cannot affect the rights of "subsequent *bona fide* purchasers," or the purchaser who acquires title "with *no notice* of any "fact which should preclude his acquiring an equitable "as well as a legal title."

The rule announced by Judge COOLEY, so far from being a novel one, has its foundation in the elementary principle, that a purchaser with notice stands in his grantor's place, and so far from the burden being on us to sustain a rule already so well fortified it is for counsel for plaintiff in error to show wherein a purchaser of a title affected with the infirmities and equities which make a retroactive law just and valid as against his grantor, should constitute an exception to the general rule governing the rights of purchasers with notice.

The validating law divested the title of the plaintiff in error in no other sense than it would divest the title of the mortgagor, if no subsequent conveyance had been made by him. Whatever title the plaintiff in error took was carved out of the title remaining in the mortgagor after his mortgage to the mortgage company, and the law created a lien on that title only in the sense in which it is not denied it could have created a lien on the title had it remained in him.

When, therefore, counsel argue that the law validating this mortgage as against plaintiff in error divested vested rights, he reasons in a circle.

Was there a vested right in the mortgagor which a retroactive law could not affect? If not, how could plaintiff in error, taking with notice and succeeding only to his rights, acquire a vested right?

That notwithstanding he may not have parted with the title, and the mortgage may have been wholly ineffectual as a conveyance, the mortgagor had no vested rights which would be impaired by the law, is not and cannot be denied, upon either principle or authority.

In *State* v. *Newark*, 3 Dutch., 197, the court say:

"Courts do not regard rights as vested contrary to the "justice and equity of the case."

In *Foster* v. *Essex Bank*, Chief Justice PARKER said: "There is no such thing as a vested right to do wrong."

In *Goshen* v *Stonington*, 4 Conn., 210, the court, HOSMER, C. J., say: "Laws of a retroactive nature affecting "the rights of individuals, not adverse to equitable princi- "ples, and highly promotive of the public good, have "often been passed, and as often approved."

In *Beach* v *Walker*, 6 Conn., 197, the court say: "The "law, undoubtedly, is retrospective, but is it unjust? A "law, although it be retrospective, if conformable to entire "justice, this court has repeatedly decided, is to be recog- "nized and enforced."

In *Lewis* v. *McElvain*, 16 Ohio, 355, the court say: "This law interferes with no vested rights. It merely "compels men to do justice."

In *Gibson* v. *Hibbard*, 13 Mich., 219, COOLEY, J., deliv- ering the opinion, says: "I do not understand that any "person has such a vested right to have his contract de- "clared void for want of compliance with some statutory "requisite as will preclude the legislature from dispensing "with the requisite and affirming the contract, which he "has attempted to make."

So it has been repeatedly held, that when there is no inherent vice or illegality in a contract, but a statute invalidates it for reasons of public policy, this is merely a penalty for disobedience, and when the prohibition is withdrawn by the repeal of the statute, the contract takes effect according to the original intent of the parties.

Central Bank v. *Empire Co.*, 26 Barb., 23.
Trustees v. *McCughy*, 2 O. St., 155.

Bank of Mo. v. *Snelling*, 35 Mo., 195.
Hannay v. *Eve*, 3 Cranch, 242.

Whatever rights in the land the plaintiff in error acquired, he acquired only such rights as the mortgagor had under these settled rules of law. By the act of the mortgagor the titles which he held had become subject to equities in favor of the mortgage company, which it required only the action of the legislature to perfect into a legal title. He had so dealt with the title, that the legislature had power at any time by withdrawing the prohibition to give vitality to the mortgage to the mortgage company. It was only a lien on this title, with all the infirmities and equities which had attached to it in his hands that the plaintiff in error acquired.

It is said that while plaintiff in error took with notice of all the facts which constituted the equities of the mortgage company, he also knew that the mortgage to that company was invalid. Grant this. Did not the mortgagor have the same knowledge? Was there not the same invalidity before he parted with the title? Yet neither its invalidity nor his knowledge was any obstacle to declaring by law that the instrument should have the force the parties intended it should have, and no reason can be suggested why a party succeeding only to his rights should stand in any better position, solely because he had the same knowledge.

A vigorous attack is made by counsel for plaintiff in error on the authorities cited by Judge Cooley.

To sustain this attack, counsel quote at length from *Bolton* v. *Johns*, 5 Barr, 145. In that case the legislature attempted to create a mechanic's lien. This the court held it could not do, and after using the language quoted

and italicized by counsel, add the following, which counsel neglect to quote: "The case stands clear of the princi- "ple of *Myers* v. *Westman*, 1 Barr, 233, in which it was "admitted that the legislature may add a legal sanction to "a moral obligation; for no such obligation rested on the "original owner, and certainly none on the purchaser. A "mechanic's lien depends on no principle of moral right, "but on positive enactment."

Two cases from Minnesota are cited: *Meagher* v. *Strong*, 6 Minn., 177, and *Thompson* v. *Morgan*, 6 *id.*, 292.

The statement of both cases is very meagre, and the facts before the court do not clearly appear. They show no facts on which to base equities, except the bare fact of the giving of the conveyance.

The remaining cases cited involved no question of notice, and are either cases such as *Russell* v. *Rumsey*, 35 Ill., 374, where the parties were *non sui juris*, and could do no act to affect their title or rights except by force of the statute; and cases such as *Gebhart* v. *Reeves*, 72 Ill., 301, where it was ruled that the leglislature could not take from A his property and vest it in B.

We may add, in this connection, that it is well settled that a law which gives validity to a void contract does not impair the obligation of the contract.

Satterlee v. *Mathewson*, 2 Pet., 412.
Watson v. *Mercer*, 8 Pet., 88.

WIRT DEXTER,
For Defendant in Error.

108-477

OFFICE SUPREME COURT U.S.
FILED
MAR 29 1883
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IN THE

Supreme Court of the United States,

October Term, A. D. 1882.

J. GROSS,
Plaintiff in Error,
v.
UNITED STATES MORTGAGE CO.,
Defendant in Error.

Error to the Supreme Court of Illinois.

Appendix to Argument for Defendant in Error.

Cases of Stevens vs. Pratt (101 Ill., 207 and 230), and Commercial Union Assurance Co. vs. Scammon (102 Ill., 46).

PRESS OF BEACH, BARNARD & CO., 104 RANDOLPH ST., CHICAGO.

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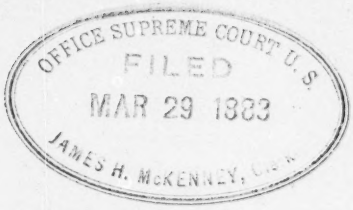

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JOHN S. STEVENS
vs.
CYRUS N. PRATT *et al.*

Filed at Springfield, September 30, 1881 — Rehearing denied January Term, 1882.

1. CORPORATION — *right to take real estate security for debts.* The latter part of section 26, of the general Incorporation law of 1872, was not designed to prevent corporations from taking mortgages on real estate as security for debts. It would seem that the right to take such security by the policy of our law, may be regarded as an incident to the right to create a debt.

2. SAME—*former decision as to corporations for loaning money.* That part of the opinion of the court in *United States Mortgage Company* v. *Gross*, 93 Ill., 483, holding that it was a part of the policy of the law of this State, as shown by section 1 of the general Incorporation act of 1872, that corporations should not be formed in the State for the business of loaning money, is overruled.

3. This court also erred in that case in holding that the first sentence of section 26 of the general Incorporation law of 1872, manifests a policy that foreign corporations were to have no right to loan money in this State.

4. The clause in the Incorporation law of 1872, that "corporations may be formed in the manner provided by" that act, "for any lawful purpose, except banking, insurance, real estate brokerage, the operation of railroads, and the business of loaning money," was not intended to, and does not by implication, prohibit the formation of corporations for the purposes so excepted, under other acts. It only prohibits their formation under that act, and therefore does not show that such corporations are prohibited by the policy of the law.

5. SAME—*foreign corporations, powers, etc., no greater than those of domestic.* The general Incorporation law of 1872 neither grants nor prohibits the right of foreign corporations to do business in this state. It is simply a law imposing regulations and restrictions, and its meaning is, that where the general laws of this state provide for the organization of corporations, foreign ones of like character doing business in this state shall exercise no greater or different powers, and shall be subject to the same liabilities, restrictions and duties.

6. SAME—*foreign, when no provision is made for like domestic.* The failure to provide for the organization of other domestic corporations than those named in the general law on the subject, is not an exclusion of foreign corporations of like character. The excepted corporations, and foreign corporations of like character, are simply unaffected by the general law of 1872; and as the formation of such corporations in the state is not prohibited, there is no prohibition of foreign corporations of the same character from doing business in this state.

7. SAME—*policy of state—how made to appear.* The policy of a state not to permit the transaction of business in its limits by foreign corporations, or to allow such corporations to acquire and hold real estate, must be expressed in some affirmative way. It cannot be affirmed from the fact that the legislature has made no provision for the formation of similar corporations.

8. SAME—*policy of state to give power to make loans, etc.* The policy

of the legislature of this state for many years has been to invest corporations with the power to loan money, and take mortgage on real estate as security therefor.

9. A loan made by a foreign corporation, in 1873, to a citizen of this state, secured by a mortgage given at the time, is not void as being prohibited by any legislation of the state, or contrary to public policy, and such mortgage may be foreclosed, and pass the title to real estate.

APPEAL from the Superior court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

This was an action of ejectment by appellant against appellees, for certain real estate in the city of Chicago, tried in the Superior court of Cook county. The plea was, not guilty.

Preliminary affidavit was filed, showing that the parties claimed from a common source of title—one Richard B. Appleby. Appellees claimed under a mortgage executed by said Appleby to the United States Mortgage Company, to secure a note, for money loaned, of $5,000, on the 25th of April, 1873, and duly recorded in the proper office on the next day. Appellant claimed under a mortgage executed by said Appleby to Elizabeth D. Smith, on the 17th of September, 1873, and duly recorded in the proper office on the 23d of said month, to secure a loan of $2,000.

Appellant claimed that he was entitled to hold title, entirely disregarding the mortgage to the United States Mortgage Company, on the ground that the note and mortgage to that company were absolutely void.

The court rendered judgment on the trial in favor of appellees, and the record comes here by appeal.

Mr. Justice SCHOLFIELD delivered the opinion of the court:

In the view we take of the questions presented by this record, it will be sufficient to inquire whether the United States Mortgage Company's acts in loaning its money to Appleby and taking from him his note and mortgage therefor, were void. The contention of the counsel for appellant is, they were void, and therefore incapable of imparting rights to anybody, and if this be not correct, the judgment below must be affirmed, without regard to the merits of the other questions discussed. These acts involve no moral turpitude, and they are in no sensible degree detrimental to the public welfare, and the only ground upon which their invalidity is claimed is, that company, as a foreign corporation, created solely for the business of loaning money, can have no legal existence, and hence do no act forming the basis of a legal right within this state.

In *United States Mortgage Co.* v. *Gross*, 93 Ill., 483, it was assumed, from the name of this corporation, the character of its transactions there involved, and the facts appearing in the case, that its principal or sole business was to loan money, taking to itself mortgages on real estate to secure the same, and it was thereupon there said: "The general incorporation law of 1872, which was in force when the mortgage was executed, provided for the formation in the State of companies for any lawful purpose, expressly excepting, however, corporations for banking, insurance, real estate brokerage, operation of railroads, and the business of loaning money." Section 26 of the act provided that foreign "corporations, and the officers and agents thereof, doing business in this State, shall be subject to all the liabilities, restrictions and duties that are, or may be, imposed upon corporations of like character organized under the general laws of this State, and shall

have no other or greater powers. And no foreign or domestic corporation, established or maintained in any way for the pecuniary profits of its stockholders or members, shall purchase or hold real estate in this state, except as provided for in this act."

"From these statutory enactments we deduce these conclusions: The latter sentence of section 26 was aimed at the purchasing and holding of real estate by corporations, for the reason such acts would tend to create perpetuities, and by this and other provisions of the same act, the evil feared was effectually guarded against. We think, however, it was not designed thereby to prevent corporations from taking mortgages on real estate as security for debts. In fact, the act contemplates corporations will acquire real estate in satisfaction of indebtedness due them, and makes such provision in the fifth section for the sale of real estate so taken, as secures the state against the evil had in legislative view, and which had been discussed by this court in *Carroll* v. *City of East St. Louis*, 67 Ill., 568. Indeed, it is difficult to see how mortgages, which are conveyances subject to conditions of defeasance, can be considered as tending to create perpetuities. Payments made of the debts thus secured defeat the titles of the mortgagees, and even if they take possession, the incomes gradually undermine and destroy their title. If the premises are sold under powers, the mortgagees cannot, themselves, become purchasers, and if the mortgages are foreclosed by suit, the decrees of the court thereafter become the basis of title.

"But we see, from the first sentence of this section 26, it was the policy of the State that foreign corporations should have no other or greater powers in the State than corporations of like character organized under the gen-

eral laws of the State; and further see, from the first section of the act, it was a part of that same policy that corporations should not be formed in the State for the business of loaning money. It follows, that corporations organized in a foreign State, for such business of loaning money, could not claim to pursue such business in this State. The comity between the States does not demand we should hold this mortgage company, incorporated under an act of the State of New York, could lawfully, within this state, exercise powers denied to corporations formed within our own borders. All the acts of this company here done in furtherance of such business of loaning money, were invalid as being obnoxious to our policy and institutions." But it was also held that the act of April 9, 1875, validated contracts of loans previously made by the company, and made them responsible the same as if they had not been prohibited when made.

Counsel for appellant assail the latter, and counsel for appellees the former, position, as being unsound in law and wholly incapable of being sustained upon any correct legal principles.

The question of the validity of such contracts may be far-reaching in its consequences, and affect large property rights. If they are valid upon any ground, the decision should be placed on that ground, while, if they are invalid, they should be so declared, and the question put at rest, so that in the future they may be avoided. In *Bowers* v. *Green*, 1 Scam., 42, it was said by this court: "The maxim, *stare decisis*, is one of great importance in the administration of justice, and ought not to be departed from for slight or trivial causes; yet this rule has never been carried out so far as to preclude courts from investigating former decisions, where the question has not un-

dergone repeated examination, and become well settled." To the same effect is *Mallett* v. *Butcher*, 41 Ill., 383; *Leavitt* v. *Blatchford*, 17 N. Y., 533; *Pratt* v. *Brown*, 3 Wis., 609.

No reason exists, therefore, which should preclude our re-examining the grounds of our decision in *United States Mortgage Company* v. *Gross*, *supra*, so far, at least, as may be necessary to what we shall deem a correct decision in the present case; but on the contrary, in view of the importance of the questions involved, it is a duty we owe to the court and to the public to do so, with such care as we can exercise. We still think, as there said, it was not designed by section 26 of the incorporation law of 1872, to prevent corporations from taking mortgages on real estate as security for debts. Indeed, sections 5 and 17, in express language, contemplate that this shall be done, and provide regulations whereby, when title shall be acquired to real estate, the corporation shall be compelled to sell it, and thereby avoid the evils anticipated from the accumulation of titles to real estate in the hands of corporations, in *Carroll* v. *East St. Louis*, 67 Ill., 568. Moreover, the policy of taking mortgages upon real estate to secure the payment of debts, by corporations as well as by individuals, in almost innumerable instances, has been recognized by legislation in this State; and we are unable to recall an instance where a corporation has been allowed to create a debt, and has been, at the same time, denied the right to take mortgage on real estate to secure it. It would seem, the right to take such security, by the policy of our law, might be regarded as an incident to the right to create a debt. Under restrictions and regulations of like character with those of the general law, no injurious consequences can possibly result to the public from so holding.

Subsequent examination and reflection, however, have convinced us that we were clearly in error in holding that it is shown by the first section of this law that it was a part of the policy of the State that corporations should not be formed in the state for the business of loaning money. That section simply defines the classes or kinds of corporations for the organization of which the act is intended to provide. It says: "Corporations may be formed, *in the manner provided by this act*, for any lawful purpose, except banking, insurance, real estate brokerage, the operation of railroads, and the business of loaning money." It is not said, nor is it the reasonable implication, that the corporations excepted may not be formed *under other acts.* Indeed, the implication is directly the reverse, for the business of the excepted corporations, by the proper construction of the language employed, is called "lawful," and there can, in the absence of unmistakable language, be no presumption of exclusion of that which is "lawful"—that is to say, which has the sanction or permission, and is consequently entitled to the protection, of the law. It is well answered by counsel for appellees: "If this reasoning is correct, it would follow that the first section was also a declaration of the policy of the State that corporations should not be formed for any of the other excepted purposes, including insurance and the operation of railroads." Yet there was at that time in force, and unaffected by that statute, a general law providing for the formation of insurance companies, and at the same session of the legislature at which that law was enacted, another law was also enacted for the formation of corporations for the operation of railroads. It is true *that act* provides for only certain corporations, and gives no right to incorporate for other purposes, and from this there may be an

implication that the legislature would not grant the right to be incorporated for the excepted purposes, *in the same manner*, and subject to the *same regulations and restrictions*, but it is not therefore to be assumed that the legislature was unwilling to grant the right to be incorporated for the excepted purposes in *another manner*, *and subject to other regulations and restrictions*. From the different natures and purposes of the excepted corporations, reason exists why different and more stringent restrictions should be thrown around them; but in such a country as ours the public welfare demands that they be allowed to be created, under proper and wise safeguards for the protection of the public, and not that they be absolutely prohibited.

On further consideration and reflection, we are convinced we also erred in holding that the first sentence of section 26 of that law manifests a policy that foreign corporations were to have no right to loan money in this State. That sentence does not say that no foreign corporation except those of like character, as are provided to be formed under that act, shall be allowed to do business in this State. It does not assume to define what foreign corporations shall be allowed to do business in this State, but simply to impose regulations and restrictions upon certain named classes or kinds of foreign corporations doing business in this State: that is, those of like character as it is provided may be formed under that general law. Its exact words are, "foreign corporations, and the officers and agents thereof, doing business in this State" (that is, that *are doing* business, not that shall hereafter *be allowed* to do business in this State) "shall be subject to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this State, and have no other or greater

powers." The language is entirely that of regulation and restriction, and not that of grant or prohibition. No corporation is granted the right to do business in the State. No corporation is excluded from doing business in this State. Simply "foreign corporations, and the officers and agents thereof, doing business in this State," are placed on an equality, to the extent that they shall exercise no greater or different powers, and shall be subject to the same regulations and restrictions, and governed by the same rules of law in these respects, with corporations of like character organized or to be organized under the general laws of this State. The meaning will, obviously not be changed, but may be placed in a stronger light by a little transposition of language, thus: "Where the general laws of this state provide for the organization of corporations, foreign corporations of like character doing business in this State shall exercise no greater or different powers, and shall be subject to the same liabilities, restrictions and duties." The manifest and only purpose was to produce uniformity in the powers, liabilities, duties and restrictions of foreign and domestic corporations of like character, and bring them all under the influence of the same law. It cannot be said that the failure to provide for the organization of other corporations, by general laws, is an exclusion of foreign corporations of like character, unless it shall be held that the failure to enact such general laws is an evidence that they are opposed to our policy.

But we have already said that from this failure there may be an implication that the legislature would not grant the right to be incorporated for the excepted purposes, *in the same manner and subject to the same restrictions;* but it is not, therefore, to be assumed that the legislature was unwilling to grant the right to be incorporated for

the excepted purposes, in *another manner and subject to other regulations and restrictions.* The excepted purposes, banking, insurance, real estate brokerage, the operation of railroads, and the business of loaning money, we have also heretofore said are recognized by the general law as being "lawful." We know, from their character, they are not *malum in se*, and we know they have never become *malum prohibitum*, unqualifiedly, by any constitution or statute of this State, and our observation and experience teach us that under wise and wholesome restrictions and regulations they are important and beneficial, if not indispensable, factors in the general business welfare of the State. Whether they shall be allowed to be carried on by one individual or by many, by partnerships or corporations, is evidently purely a question of policy, and not a question of power or right in the government; and it may be asserted, without the fear of contradiction, that the policy of the State has been to allow banking, insurance, real estate brokerage, the operation of railroads, and the business of loaning money, either independently or in connection with or as incidental to other branches of business, by corporations—and this will hereafter be fully shown by reference to specific acts of the legislature. But corporations for these purposes, under our constitution, are private. The public does not become a stockholder in or owner of them, and so it is not the business of the legislature, of its own volition and unsolicited, in order to indicate its policy, merely, to incorporate or provide for the incorporation of such companies. The power to provide for the corporation exists, but it is useless to exercise it unless there is a demand for it,—in other words, if no persons desire to become incorporated

for these purposes, no unfavorable inference can be drawn from the failure of the legislature to enact laws upon the subject. It is true, the reason a legislature fails to enact a general law providing for a particular class of incorporations *may be* because to do so would be opposed to its policy; but it may also fail to do so because there is no demand for such a law—either because the demand has heretofore been answered by special acts of incorporation, adopted prior to but continued in force by the present constitution, or because money in the State is scarce, and can be borrowed abroad, as is often the case, much cheaper than at home, or from both causes. It can hardly admit of debate, that, ordinarily, a demand for private charters, either through general or local and special laws, will not exist unless it is understood profitable returns can be made on money invested in business thereunder; and whether such returns can be made, will, usually, depend on questions entirely disconnected from the disposition of the legislature to grant or withhold legislation for such charters. And so, it follows, mere absence of legislation authorizing the formation, in the future, of a particular class or kind of corporations, cannot be accepted as conclusive evidence that it is against public policy to create such corporations.

But again, what was in the legislative mind when this general law was enacted? Manifestly, only the classes of corporations anticipated to be created under its provisions, as defined in section 1. The necessity for, and the powers, limitations and restrictions proper to other corporations (those excepted), can, under no rational rule of construction, be presumed to have been in mind. Stated differently, the legislators' minds are presumed to have been directed to what they were doing, and not to

what they were not doing. They were providing for certain corporations, leaving others unprovided for, and so what they did not provide for is not affected by the legislation they enacted, whether we regard domestic or foreign corporations. The excepted corporations, and foreign corporations of like character, are simply unaffected by this law. And this was the purport of our ruling in *Wincock et al.* v. *Turpin*, 96 Ill., 135, where we held that the remedies provided for creditors against stockholders, although in broad and comprehensive language, applied only to the corporations organized under this act.

We concede all foreign corporations might have been prohibited from doing business in this State except those of like character as contemplated to be organized under the provisions of this act; but then it would have been very easy to have said so in unmistakable terms, and we do not feel warranted in assuming, from the absence of language, or from, even (if it were to be found) ambiguous language, that a policy has been adopted so repugnant to the business welfare of our citizens, and so wanting in that spirit of comity which should characterize the conduct of the sister States towards each other.

Counsel say, "the prohibition is not against doing business in this state, but it is against having any other or greater powers, and as a domestic corporation could not have any, so the foreign could have none whatever." This would be true if the statute prohibited other corporations than such as are of like character with those contemplated to be incorporated under its provisions, from doing business in the state. But we have seen that this is not its language, nor, in our opinion, its meaning. It does not apply, either in terms or by implication, to other foreign corporations than such as are of like character with those

contemplated to be organized under its provisions. What powers they may exercise, and what regulations or restrictions they shall be subject to, is defined. What powers other foreign corporations may exercise, and under what regulations and restrictions they shall be allowed to act, is not defined.

Counsel ask the question, "Can it be seriously pretended that a foreign corporation excluded from the State can make a contract in this State without authority, and enforce it in the courts of this State?" We answer, certainly not. But this assumes this corporation has been excluded from this State. How has it been excluded? We have shown it is not excluded by the positive *letter* of the law, and we think we have furnished satisfactory reasons why it can not be held to have been excluded by a fair construction of the *meaning* of the law. It remains only, then, to inquire whether, aside from the general law, it is contrary to public policy, or injurious to our welfare, to tolerate this corporation, and enforce its contracts in this state. The only cases referred to by counsel, on this question, are *United States Trust Co.* v. *Lee*, 73 Ill., 142; *Cin. M. H. A. Co.* v. *Rosenthal*, 55 *id.*, 85; *Starkweather* v. *American Bible Society*, 72 *id.*, 50; *Carroll* v. *City of East St. Louis*, 67 *id.*, 570.

In *Cin. M. H. A. Co.* v. *Rosenthal*, assumpsit was brought on a promissory note given for stock in an insurance company, and for premium on a policy issued by such company, payable upon the call of the directors. The defense interposed was, the insurance company was a foreign corporation, and it had not at any time, previous to the making of the note, furnished the Auditor of this State with a statement of the condition and affairs of the company, as required by the law then in force, and the

Auditor had not issued to the company, or any agent, any authority to transact business in this State, which, it was averred, rendered the note void, and of no binding effect. The defense was sustained, and the note held void, upon the ground that the transaction was expressly prohibited by law. Among other things, the court there said: "The note was made and delivered, and the policy given, and the contract consummated, in this State, in defiance of a law which is so plain in its terms that it can bear no construction, and which no one can misunderstand, declaring all such contracts unlawful. It says, it shall not be lawful for any such agent, directly or indirectly, to take risks, or transact any business of insurance in this State, until they comply with the terms prescribed in the act. To permit the company, when they admit they have disregarded all these requirements, to recover, would be for the courts to disregard the clearly expressed will of the General Assembly, and to say what it has said shall be unlawful, is and shall be lawful and binding."

In *Carroll* v. *The City of East St. Louis*, the action was ejectment, and the question was, whether the Connecticut Land Company could, in this State, take, hold and convey titles to real estate. It was held that it could not, because to allow it to do so would tend to create perpetuities, and it was contrary to the general public policy of this State to allow corporations to be created for the sole purpose of buying, holding and selling, or conveying real estate, and this was shown by reference to the practice of this state in refusing to grant charters, etc., for this purpose, and in the general legislation on kindred questions.

So far as *Starkweather* v. *American Bible Society* has any bearing upon this question, it rests upon the same principle as *Carroll* v. *City of East St. Louis.*

In *United States Trust Co.* v. *Lee*, it was held, upon the principle of *Carroll* v. *East St. Louis*, a foreign corporation can not be a trustee to real estate.

In neither of these cases was the mere absence of legislation creating or authorizing the creation of a corporation for a particular purpose, held to be sufficient evidence showing that it was against public policy to allow foreign corporations of like character to transact business in this state; but, upon the contrary, the decisions are expressly predicated upon the direct affirmative acts of the state in refusing to create such corporations, or in denying their power to transact business in the State.

In *Bank of Augusta* v. *Earle*, 13 Pet., 277, in answer to the position of counsel that the rules of comity between foreign nations do not apply to the States of this Union, that they extend to one another no other rights than those which are given by the constitution of the United States, and that the courts of the general government are not at liberty to presume, in the absence of all legislation on the subject, that a State has adopted the comity of nations towards the other States as a part of its jurisprudence, or that it acknowledges any rights but those which are secured by the constitution of the United States, the court, per TANEY, Ch. J., said: "The court think otherwise. The intimate union of these States as members of the same great political family, the deep and vital interests which bind them so closely together, should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen) the interest or policy of any State requires it to restrict the rule, it has but to declare

its will, and the legal presumption is at once at an end. But until this is done, upon what grounds could this court refuse to administer the law of international comity between the States? They are sovereign States, and the history of the past, and the events which are daily occurring, furnish the strongest evidence that they have adopted towards each other the laws of comity in their fullest extent. Money is frequently loaned in one State by a corporation created in another. The numerous banks established by different States are in the constant habit of contracting and dealing with one another. Agencies for corporations engaged in the business of insurance and of banking have been established in other States, and suffered to make contracts without any objection on the part of the State authorities. These usages of commerce and trade have been so general and public, and have been practiced for so long a period of time, and so generally acquiesced in by the States, that the court can not overlook them when a question like the one before us is under consideration. The silence of the State authorities while these events are passing before them, show their assent to the ordinary laws of comity which permit a corporation to make contracts in another State." And again, he says: "So far as any of them (the States) have acted on this subject, it is evident that they have regarded the comity of contracts, as well as the comity of suit, to be a part of the law of the state, unless restricted by statute."

The doctrine of this case is approved, and its ruling followed, in *Bank of Washtenaw* v. *Montgomery*, 2 Scam., 422. The court there, among other things, said: "It can not well be imagined that the courts of any State would refuse to execute a contract by which a corporation had

borrowed money in another State than that by which it was created. * * * Unless there should be a prohibition by statute, we can see no possible ground on which to rest the objection to the right of a foreign corporation to maintain an action in our courts."

In *Farmers' Loan and Trust Co. of N. Y.* v. *McKinney*, 6 McLean, 7, the court said: "In Michigan, no law or policy of the State is shown which prohibits corporations from purchasing lands in the State, and it is presumed that no such law as in the State of Pennsylvania exists in Michigan. It would seem, therefore, that the corporation of another state, as the Farmers' Loan and Trust Company, which is authorized by its charter to loan money on mortgages, may take a mortgage on lands in Michigan, there being no prohibitory law or policy of that State on the subject." Again it is said: "And that such a legal organization, having the right to loan money on mortgages without restriction of territory, should have a right to take mortgages wherever its loans are made, would seem to be a matter of course. And this may be safely assumed, where there is no prohibition."

In *Cowell* v. *Springs Co.*, 100 U. S., (10 Otto,) 55, the National Land Improvement Company, of El Paso county, Colorado, was a corporation created under the laws of Pennsylvania, with power to "receive, hold, and grant real and personal property, explore, locate and improve lands, etc., * * provided such lands be located in Utah, Arizona, or adjoining States and Territories lying west of the Mississippi." By the law of Congress of March 2, 1867, then in force, the legislatures of the several Territories of the country were prohibited from granting private charters, and were only authorized to create by general law corporations for mining, manufactur-

ing, and other industrial pursuits. The defendant contended that this corporation had no capacity to act in the Territory of Colorado, and to hold and convey real property there—that congress intended to prevent the creation of corporations like this, and if a domestic corporation could not be created with such powers for reasons of public policy, a foreign corporation could not, for like reasons, be permitted to exercise them in the territory. But the court said: "The answer to this position is found in the general comity, which, in the absence of positive direction to the contrary, obtains through the States and Territories of the United States, by which corporations created in one State or Territory are permitted to carry on any lawful business in another State and Territory, and to acquire, hold and transfer property there equally as individuals. If the policy of the State or Territory does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way—it cannot be affirmed from the fact that its legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law. Telegraph companies did business in several States before their legislatures had created or authorized the creation of similar corporations, and numerous corporations existing by special charter in one State are now engaged, without question, in business in States where the creation of corporations by special enactment is forbidden." The same doctrine was subsequently repeated by the same court in *Christian Union* v. *Yount*, 101 U. S. (11 Otto), 356.

No one pretends that the business of loaning money or taking mortgage security therefor, was ever prohibited by law in this State, and we shall show the policy of this State has been to invest corporations with these powers.

On the 19th of February, 1857, an act was passed by the general assembly, and approved by the governor, incorporating the Farmers' Savings, Loan and Trust Company, and it was authorized to "have, enjoy and exercise all the powers necessary to carry out and execute the purposes and intent of a savings, loan and trust company," and it was specially empowered to "take and hold any real estate, in trust or otherwise, as security for, or in payment of, loans and debts due or to become due, to purchase real estate at any sale made in virtue of any loan, debt or mortgage made to or held by the said company." (Private Laws of 1857, p. 1386.) The Chicago Loan and Trust Company was incorporated under an act of the legislature approved February 19, 1859, and it was empowered to borrow money, and receive money on deposit, and pay interest thereon, and to loan the said money," etc., and also to "take and hold any real estate, in trust or otherwise, as security for, or in payment of, loans and debts due and to become due to said company, to purchase real estate at any sale made in virtue or on account of any loan, debt, or mortgage, or trust, made to or held by the said company," etc. (Private Laws of 1859, p. 401, secs. 3, 4.) The Central City Trust Company was incorporated under an act of the legislature February 21, 1861. (Private Laws of 1861, p. 453.) The Princeton Loan and Trust Company was incorporated under an act approved February 16, 1865. (Private Laws of 1865, vol. 1, p. 24.) The Marion County Trust and Loan Company was incorporated under an act approved March 8, 1867. (Private Laws of 1867, vol. 2, p. 277.) The Avon Exchange and Loan Company was incorporated under an act approved March 31, 1869. (Private Laws of 1869, vol. 2, page 700.)

And the Montgomery County Loan and Trust Company was incorporated under an act also approved March 31, 1869. (Laws of 1869, vol. 2, p. 714.) And all of these last named corporations were vested with substantially the same powers in respect to loaning money and taking mortgage therefor, as was the Chicago Loan and Trust Company, *supra*. In 1867 the General Assembly also incorporated "International Mutual Trust Company," and invested it with power to hold and loan money, and to take and hold real estate in trust, as security for the payment of loans and debts due the corporation. (Private Laws of 1867, vol. 1, p. 95.) And it was shown, upon the trial of *The People ex rel.* v. *Loewenthal*, 93 Ill., 191, which was a proceeding by *quo warranto* to test the validity of that charter, that about 175 charters or statutes had been passed since the adoption of the constitution of 1848, establishing corporations with like powers as those conferred upon the International Mutual Trust Company. Many of these corporations, thus created by special charter before the adoption of the present constitution, are still doing business in the state, and have been ever since they were created, that instrument only providing for the formation of private corporations, under general laws, in the future, but leaving those organized and doing business before its adoption in full force and unaffected by its requirements.

Since the adoption of the present constitution, and on the 4th of April, 1872, a general law enacted to enable associations to become incorporated to raise funds to be loaned only among their members, and power was given to loan their capital, under certain restrictions, to their own members, and to take mortgage on real estate therefor (2 Gross' St., p. 67), and on the 9th of April, 1875, an

act was approved "to enable corporations in other States and countries, to loan money in Illinois, to enforce their securities, and acquire title to real estate as security." (Public Laws of 1875, p. 65.)

We doubt if a more uniform and consistent policy can be shown to have been pursued by the State upon any other subject, for the last twenty years, than is thus shown to have been pursued with regard to investing corporations with power to loan money and take mortgage upon real estate as security therefor.

But it seems to be thought that the corporations referred to materially differ from the corporation here, in that they all had to borrow money and receive money on deposit, etc., as well as to loan money, while here the power is simply to loan money. If it be conceded that difference exists, can it affect materially the question under consideration? If a corporation be empowered to loan money and take mortgage therefor, is not this sufficient? In these special charters the power to loan is a separate and distinct power, and not incidental, merely. It is not compulsory on the corporations that they shall exercise all their granted powers, and inasmuch as the exercise of one power is not dependent upon the others, it is, it would seem, totally unimportant, on principle, whether one corporation be created with power to loan its capital, and another corporation be created with power to discount bills or notes, or one corporation be authorized to do all. If all are legal, when vested in one, what makes them illegal when vested in two? Can it possibly make any difference to the sovereign State of Illinois, or to any of its citizens, whether a foreign corporation, which comes here to loan its money has power by its charter to effect insurance, as well as to loan money, or whether it has power merely to loan

money? Is there anything in the exercise of this power by a corporation which is affected by the additional powers possessed by the corporation, or by the fact whether or not it has additional powers? Until it can be demonstrated that the possession of the additional powers can, in some substantial way, affect the loan, we must hold that it can make no difference whether the corporation be authorized to bank, or effect insurance, or build railroads, as well as to loan money, or whether it is authorized to effect loans, solely. We think it is only material to know for the present purpose, that loaning money and taking mortgage on real estate as security are recognized, under our law, as a lawful business, and it is a business which it has been the policy of our State to vest in corporations, and this, too, usually, without regard to whether other independent powers in regard to business have also been vested in the corporation.

But this corporation, in addition to the power to loan money, is expressly invested with power, by its charter, to issue bonds of the company, and sell and dispose of them (which is, in effect, power to borrow money), to receive moneys on deposit, and to purchase, hold and convey such real estate, etc., as the company may acquire in the collection or settlement of its demands, etc., thus making it, substantially, a corporation of the same character as those incorporated under the special charters to which we have referred.

In the first section of the act of April 9, 1875, *supra*, it is enacted that any foreign corporation that may have invested or lent money in this State, 'may have the same rights and powers for the recovery thereof, subject to the same penalties for usury, as private persons, citizens of

this State,' etc. Waiving all question of the competency and effect of this as a validating statute, we think, in connection with the practice of the state, as evinced in the enactment of the laws before referred to, that it should be regarded as conclusive on the question of the general public policy of the state. It emanates from the legislature, —the tribunal in which is lodged the power to determine the question of public policy,—and is an assertion, in effect, that the transactions of such corporations have not been contrary to the general public policy of the State.

In *Railway Investments and Securities*, 2 Redfield's Am. Ry. Cases, 226, in speaking of an analogous statute, Judge CURTIS, of the Supreme court of the United States, then presiding at circuit, said: 'After the legislature had thus granted to the corporation new powers, to enable it the better to accomplish its duties to the public by paying off this mortgage, and had interposed to facilitate the exercise of the powers of the trustees under the mortgage by regulating and restricting the personal liabilities to be incurred by them in the exercise of these powers, it seems to be impossible to maintain that the mortgage itself is void because contrary to the public policy of the State. The will of the legislature, while acting within the powers conferred by the people of the State, constitutes the public policy of the state, and so far from manifesting its will to have this mortgage void and inoperative, it has interfered to help out its operation, and make it more easily available as a security. I do not think a court of justice can undertake to declare that mortgage was contrary to the public policy of the State, after the legislature has directly interposed to aid the mortgagees to act under it.

For the reasons expressed, we are of opinion the note and mortgage were not void when given, but were valid

and binding, and being so, the junior mortgage by Appleby to Smith is not entitled to priority.

The decree of the Superior court is affirmed.

Decree affirmed.

Mr. JUSTICE WALKER: I am unable to concur in the conclusion reached.

Subsequently, on an application for a rehearing, the following additional opinion was filed:

PER CURIAM: A re-hearing is prayed for in this case mainly on the ground that the appellant and his grantor purchased and paid for the land in controversy after the decision in *United States Mortgage Company* v. *Gross*, 93 Ill., 483, and upon the faith of that decision. Counsel say: "After the last opinion in the Gross case had been filed, and after the decision therein had become, so far as this court could make it, the established law of this state, the appellant and his grantor (Corbine) purchased and paid for the land in controversy here, relying upon that decision, and believing, as they had a right to believe, that the law was as this court had therein deliberately declared it to be." But the decision in *United States Mortgage Co.* v. *Gross* was precisely as is the decision here, namely, that the mortgage to the United States Mortgage Company was valid, and hence entitled to priority over subsequent claims to the same property. In that case the court, in assigning reasons for the decision made, expressed the opinion that the mortgage, when first executed, was void, because contrary to public policy, but that it had been validated, and made binding and obligatory by the act of April 9, 1875. This, however, was mere argument to justify the decision. The decision was,

simply, as before said, that the mortgage was valid, and hence entitled to priority over subsequent claims to the same property.

On the theory of reasoning adopted by the counsel for appellant, when the appellant and his grantor bought, they bought with the knowledge and on the faith that this court held the mortgage by Appleby to the United States Mortgage Company valid and binding, and entitled to priority over the claim they were then purchasing. They have not been disappointed, therefore, by the present decision, and cut out of any right which by *United States Mortgage Co.* v. *Gross*, we held they might acquire. The title or claim we held good in *United States Mortgage Co.* v. *Gross*, we still hold good, though for a different and, we think, more satisfactory reason. Indeed, we have not here ruled that is impossible to sustain the claim of the Mortgage Company on the ground assigned in the *Gross case*. We have simply placed our ruling on different and, as we think, stronger ground. Had we, in all respects, not only ruled, but also reasoned, as in the *Gross case*, appellant's position would not have been, in the slightest, different from that which is now assigned to him.

It is nowhere decided that parties have vested rights in the reasons assigned for decisions. Where was it ever held that a line of decisions was to be set aside, and the judgments opened up, merely because it was subsequently discovered stronger and more satisfactory reasons existed for the ruling than those expressed when the decisions were made? Had the decision here been different from what it was in the *Gross case*, the authorities cited by counsel would be applicable; but since the decision here is the same, and the reasoning in support of the decision only is different, they have no application.

It is also said by counsel, "instances mentioned of domestic corporations having power to loan money, are not applicable. All such corporations were banks." In this view, also, counsel are in error. We have expressly decided in *People ex rel.* v. *Loewenthal et al., supra*, such corporations are not banks.

In connection with this petition we have also carefully considered the petition for rehearing in *Commercial Union Assurance Co.* v. *Scammon*, (102 Ill., 46.) The most forcible argument there, as we think, against our position as expressed in the opinion here, is thus stated: "When the State, by a constitutional requirement, prohibited its own citizens from acquiring any more special privileges of any kind, and passed laws for the formation of corporations for the transaction of almost every other kind of business but that of loaning money, it thereby declared that it would not, until it saw fit, permit the transaction of that kind of business through the instrumentality of any new corporation." This, as we conceive, is sufficiently answered in the opinion by the quotation there given from the opinion of Mr. Justice FIELD, in *Cowell* v. *Springs Co.*, 100 U. S. (10 Otto), 55. The act of Congress there imposed the same restriction upon the territorial legislature that our constitution imposes upon our legislature, and as has been seen, it was there held, and the court in express terms declared, "it cannot be affirmed, from the fact that its legislature has made no provision for the formation of similar corporations, or allows corporations only to be formed by general law," that the policy of the territory was against the formation of such corporations, but that such policy must be expressed in some affirmative way.

We have patiently, and with such care as we can

bestow consistently with other duties, gone over and reconsidered every portion of the opinion, and we perceive no reason to take back or modify anything therein said.

The prayer of the petition is denied.

Rehearing denied.

COMMERCIAL UNION ASSURANCE COMPANY

vs.

J. YOUNG SCAMMON.

Filed at Ottawa November 10, 1881—Rehearing denied March Term, 1882.

1. CORPORATION—*power to loan money and receive mortgage security—and herein, of foreign corporations.* It has been the policy of the legislature of this State for many years to invest corporations with the power to loan money and to take mortgage on real estate as security therefor. Nor are foreign corporations of like character prohibited by any existing legislation from exercising like powers within this State.

2. So where a loan was made in this state by the United States Mortgage Company, a corporation created under the laws of the State of New York, and a mortgage upon real estate was executed to the mortgage company to secure the loan, it was *held*, the transaction was a valid one, and by a sale and conveyance under a power in the mortgage, the title to the mortgaged premises passed to the purchaser.

3. SAME—*as to change of title to real estate, within the meaning of a prohibitory clause in a policy of insurance.* A policy of insurance upon a building provided: "If the property be sold or transferred, or any change take place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance," "without the consent of the company indorsed hereon," "this policy shall be void." At the time the policy was issued there was existing a mortgage upon the premises, which had been executed by the assured to a foreign corporation to secure a loan of money. Subsequent to the date of the policy, the premises were sold under a power in the mortgage, and a conveyance executed to the purchaser. Afterwards that purchaser conveyed to another: *Held*, as the mortgage was a valid one, the conveyances mentioned operated as a change of title to the property insured, within the meaning of the policy, and the policy was thereby forfeited.

APPEAL from the Appellate court for the First district, heard in that court on appeal from the Circuit court of Cook county; the Hon. THOMAS A. MORAN, Judge, presiding.

This was an action upon a policy of insurance, to recover for a loss upon a building in the city of Chicago. The policy, among other things provided: "If the property be sold or transferred, or any change take place in title or possession, whether by legal process or judicial decree, or voluntary transfer, or conveyance," "without the consent of the company indorsed hereon," "this policy shall be void."

The defense interposed by the company was, that prior to the making of the policy the assured had mortgaged the premises insured to the United States Mortgage Company, a corporation created under the laws of the State of New York, to secure a loan of money from that corporation,—it being further shown, that after the policy was issued, the mortgaged premises were sold under a power in the mortgage, and conveyed to James H. Rees, the purchaser. Subsequently, Rees conveyed to Samuel D. Babcock. The insurance company contend that these conveyances, which were made without its consent, operated to change the title to the property insured, in such way as to render the policy void. Scammon, the assured, insists the mortgage he had executed was void, and hence there was no change in the title to the premises, and that is the question in the case.

Mr. Chief Justice Craig delivered the opinion of the court.

This was an action brought by J. Young Scammon against the Commercial Union Assurance Company upon a policy of insurance issued January 2, 1874, for the sum of $5,000 for one year on certain premises in Chicago.

The policy contains the following provision: "If the property be sold or transferred or any change takes

place in the title or possession, whether by legal process or judicial decree or voluntary transfer or conveyance, * * * * this policy shall be void."

In May, 1872, Scammon applied to the United States Mortgage Company, a foreign corporation created by the laws of the State of New York, for a loan of money. On May 30, 1872, a bond and mortgage were executed, ready for delivery, and on the 9th day of July the mortgage company paid to Scammon the amount agreed to be loaned — $200,000; received the bond and mortgage, and placed the mortgage upon record. In November, 1873, Scammon made default in the payment of interest, and the mortgage company elected to declare the whole debt due, as provided by the terms of the bond and mortgage, and advertised the property for sale on March 31, 1874. In pursuance of the notice the property was sold and bid off by James H. Rees for the sum of $100,000. On the 20th day of April, 1874, Rees conveyed the property to Samuel D. Babcock. The property was destroyed by fire July 14, 1874.

On trial of the cause in the Circuit court, the following instruction was asked by the defendant and refused:

"12. The jury are instructed as a matter of law, that the mortgage executed by the plaintiff to the United States Mortgage Company, the deed executed by the mortgage company to James H. Rees, and the deed executed by James H. Rees to Samuel D. Babcock, which have been given in evidence, operated as a change of title to the property described in the policy within the meaning of the provision of the policy upon that subject, and they should find a verdict for the defendant."

The decision of the court on this instruction is the only question which it will be necessary to consider, as the dis-

position of that question will settle the whole controversy involved in the case. The Circuit court doubtless refused the instruction on the authority of *The United States Mortgage Company* v. *Gross*, 93 Ill., 483. This court, in the recent case of *Stevens* v. *Pratt*, opinion filed September 30, 1881 (101 Ill., 206), had occasion to review the decision in the *Gross case*, and that opinion was overruled in so far as it held a mortgage void which was executed to a foreign corporation after the adoption of the general incorporation act of 1872.

The decision in *Stevens* v. *Pratt*, is conclusive of the question involved in this case. It will not be necessary to repeat here the reasoning upon which that decision is based, but we content ourselves with a reference to that case for a full expression of the views of the court upon the question. In accordance with the decision in *Stevens* v. *Pratt*, the court erred in refusing the instruction.

The judgment of the Appellate court will be reversed and the cause remanded.

Judgment reversed.

Mr. Justice WALKER:

I hold the mortgage company had no power to take, hold or convey the title to this property, and therefore dissent.

Mr. Justice DICKEY:

While the mortgage company may have been capable of taking and holding a lien upon real estate in this state, it was prevented by statute from taking title. Having no title, a deed made in its name to another conveyed no title. At law I think there was no change in the legal title, and hence the policy was not thereby avoided.